

***United States Court of Appeals
for the Second Circuit***



APPENDIX

77-2110

To Be Argued By
GERALD RYAN

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES ex rel. MARTHA CARMONA, DONNA
FOGGIE, and all other persons similarly
situated,

Petitioner-Appellees,

-against-

BENJAMIN WARD, Commissioner of the New York
State Department of Correctional Services;
FRANCES CLEMENT, Superintendent, Bedford
Hills Correctional Facility, Bedford Hills,
New York, and all other persons similarly
situated; FRANK CALDWELL, Acting Chairman
of the New York State Board of Parole; and
the NEW YORK STATE BOARD OF PAROLE,

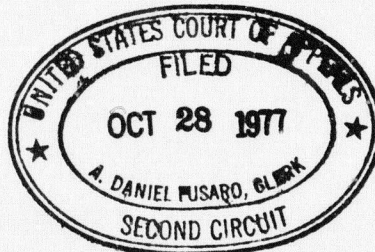
Respondents-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF NEW
YORK

JOINT APPENDIX

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TABLE OF CONTENTS

	<u>Page</u>
Docket Sheet.	1
Notice of Appeal.	4
Order.	7
Petition for Writs of Habeas Corpus (Carmona, Foggie).	8
Petition for Writ of Habeas Corpus (Fowler).	25
District Court Decision.	41
Cashel Testimony (excerpt).	100
Japha Testimony (excerpt).	111
Rudenstein Testimony (excerpt).	129
Dept. of Correctional Services Annual Statistical Rep.	169
Effects of 1973 Drug Laws on N.Y. State Courts.	171
Certificate of Release on Parole.	216
Elwin Deposition (excerpt).	217

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MARTHA CARMONA, DONNA FOGGIE, and
ROBERTA FOWLER,

Petitioners,

-against-

BENJAMIN WARD, Commissioner of the
New York State Department of
Correctional Services; FRANCES
CLEMENT, Superintendent, Bedford
Hills Correctional Facility, Bedford
Hills, New York; EDWARD HAMMOCK,
Chairman of the New York State Board
of Parole; and the NEW YORK STATE
BOARD OF PAROLE,

Respondents.

NOTICE OF APPEAL

75 Civ. 6219
(C.B.M.)

S I R S :

PLEASE TAKE NOTICE that the respondents appeal from a judgment rendered by the Honorable Constance Baker Motley on August 17, 1977, docketed on August 17, 1977, and entered on August 17, 1977 by the United States District Court for the Southern District of New York, to the United States Court of Appeals for the Second Circuit insofar as the aforesaid judgment granted petitioners Carmona and Fowler relief. Respondents appeal from that portion of the aforesaid judgment which granted petitioners Carmona and Fowler relief.

Dated: New York, New York
September 8, 1977

Yours, etc.,

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State of New York
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STATE OF NEW YORK
COUNTY OF NEW YORK } ss.

that he is being duly sworn, deposes and says
in the office of the Attorney General of the
State of New York, the Attorney for
day of 19 .. be served the annexed upon the following named persons:

Attorney in the within entitled by depositing a true and correct copy thereof, properly
enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at TWO WORLD
TRADE CENTER NEW YORK, N.Y. 10047 directed to said Attorney at the address within the State designated by
for that purpose.

Sworn to before me this
day of 19 ..

Assistant Attorney General of
the State of New York

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF
NEW YORK

MARTHA CARMONA, DONNA
FOGGIE, and ROBERTA FOWLER,

Petitioners,

-against-

BENJAMIN WARD, Comm. of the
NYS Dept. of Corr. Services;
et al.,

Respondents.

NOTICE OF APPEAL

LOUIS J. LEFKOWITZ,
Attorney General

Attorney for Respondent

Office And Post Office Address
Capitol, Albany, N.Y. 12224
New York Office
TWO WORLD TRADE CENTER, NEW YORK, N.Y. 10047
Tel. (212) 488-3068
Personal service of a copy of

within
is admitted this day of
19 ..

Sir:
Please take notice that the within is a true
copy of a
this day duly entered herein in the office of
the Clerk of

Dated, N.Y., 19 ..

Yours, etc.,
LOUIS J. LEFKOWITZ,
Attorney General,

Attorney For
Office And Post Office Address
Capitol, Albany, N.Y. 12224
New York Office
TWO WORLD TRADE CENTER, NEW YORK, N.Y. 10047
To Esq.

Attorney for

Sir:--
Please take notice that the within

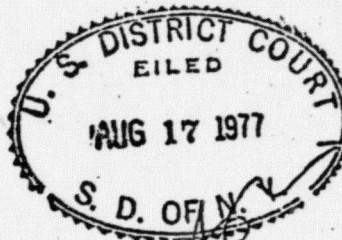
will be presented for settlement and signature
herein to the Hon.
one of the judges of the within named Court, at

in the Borough of day of
City of New York, on the 19 .. at M.

Dated, N.Y., 19 ..
Yours, etc.,
LOUIS J. LEFKOWITZ,
Attorney General,

Attorney For
Office And Post Office Address
Capitol, Albany, N.Y. 12224
New York Office
TWO WORLD TRADE CENTER, NEW YORK, N.Y. 10047
To Esq.

Attorney for



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- X
MARTHA CARMONA, et al.,

Petitioners,

-against-

BENJAMIN WARD, et al.,

Respondents.
----- X

:
: 75 Civ. 6219

:
: (C.B.M.)

:
: ORDER

In accordance with this Court's opinion dated August 4, 1977, it is now Ordered, Adjudged and Decreed as follows:

1. Petitioners Martha Carmona and Roberta Fowler are to be unconditionally discharged from incarceration and custody at the expiration of their minimum terms of imprisonment unless, within ninety (90) days from August 4, 1977, new, and constitutionally appropriate maximum sentences, are imposed upon these petitioners.

2. The petition of Donna Foggie is dismissed without prejudice to later challenging failure to discharge her from parole custody at the time that she first becomes eligible under state law for consideration for such discharge and without prejudice to filing a new petition challenging her original life sentence in the event of re-incarceration pursuant thereto.

Dated: New York, New York
August 17, 1977

So Ordered

MICROFILM

AUG 18 1977

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
UNITED STATES ex rel. MARTHA CARMONA,
DONNA FOGGIE, and all other persons
similarly situated,

Petitioners,

-against-

BENJAMIN WARD, Commissioner of the New York
State Department of Correctional Services;
FRANCES CLEMENT, Superintendent, Bedford
Hills Correctional Facility, Bedford Hills,
New York, and all other persons similarly
situated; FRANK CALDWELL, Acting Chairman
of the New York State Board of Parole; and
the NEW YORK STATE BOARD OF PAROLE,

Respondents.

PETITION FOR WRITS
OF HABEAS CORPUS
(CLASS ACTION)

-----x
Petitioners Martha Carmona and Donna Foggie, by their
attorneys, hereby petition this Court on their own behalf and on
behalf of all other persons similarly situated, for writs of habeas
corpus on the ground that they are in custody in violation of
the Constitution and laws of the United States.

I. PRELIMINARY STATEMENT

1. This is a habeas corpus proceeding brought by
Martha Carmona and Donna Foggie on behalf of themselves and all
other persons similarly situated, challenging the constitution-
ality of certain sections of the Penal Law, Criminal Procedure
Law, and Correction Law of New York, as amended in 1973, governing
the treatment of A felony drug offenders. These sections are
more fully described in paragraph 24 infra, and are hereinafter
collectively referred to as the "1973 drug law".

2. The 1973 drug law provides harsher penalties for drug crimes than for any other crime under New York law.

a) It singles out all persons convicted under it for mandatory minimum sentences ranging from one to 25 years, for mandatory life maximum sentences in all cases, and for permanent parole surveillance without possibility of discharge. Yet the group of persons convicted under the 1973 drug law includes many marginal offenders and persons convicted of relatively minor offenses.

b) It is unique in New York law in denying to drug offenders the opportunity to have consideration given to such factors as the individual characteristics of the defendant and the circumstances of the crime in determining the penalty to which they should be subject. The New York courts' traditional sentencing discretion is uniquely curtailed for drug offenders by the mandatory sentencing structure of the law. The courts have no discretion whatsoever to provide for a lesser prison sentence, for probation or for a suspended sentence in place of imprisonment, no matter how extenuating the circumstances. In addition, the right to plea bargain is uniquely curtailed in New York State under the 1973 drug law, which denies the least serious category of A felony drug offenders, those charged with A-III offenses, the right to plea bargain at all. Finally, in providing for lifetime parole without possibility of discharge for all those convicted of A felony drug offenses, the 1973 drug law denies them alone the opportunity for individualized consideration by the parole board granted every other offender under New York law. The only discretion allowed under this law is placed in the hands of the prosecutor, and his discretion is again limited under the law to recommending a sentence of probation for more serious offenders with sufficiently high criminal contacts to make them useful informants.

c) The 1973 drug law also denies bail pending appeal to all persons convicted under it. This provides uniquely harsh treatment to A-III drug offenders, since non-drug offenders with comparable minimum sentences are permitted bail under New York law. It results in the lack of an effective appeal in many cases.

3. The 1973 drug law's provisions are harsh and unusual not only by comparison to the treatment afforded non-drug offenders in New York, but also by comparison to that afforded drug offenders by all other states in this nation.

4. Petitioners claim that the 1973 drug law on its face and as applied to them and members of their class violates the Equal Protection, Due Process, and Cruel and Unusual Punishment Clauses of the Eighth and Fourteenth Amendments to the United States Constitution.

5. As a result petitioners are in custody in violation of the Constitution of the United States.

6. Petitioners have made no prior applications for writs or relief similar to that sought herein.

II. JURISDICTION

7. Jurisdiction is conferred by 28 U.S.C. §§2241 and 2254.

III. PARTIES

8. Petitioner Martha Carmona is presently serving an indeterminate sentence of six years to life, the minimum sentence permitted by the 1973 drug law pursuant to her plea of guilty to the crime of criminal possession of a controlled substance in the second degree, an A-II felony under the 1973 drug law.

9. Petitioner Donna Foggie is presently serving an indeterminate sentence of one year to life, the minimum sentence permitted by the 1973 drug law for her conviction of the crime of criminal sale of a controlled substance in the third degree, an A-III felony under the 1973 drug law.

10. Respondent Benjamin Ward is the Commissioner of the New York State Department of Corrections and as such has custody of petitioners and all members of their class by virtue of New York Correction Law §§5, 18, and 72.

11. Respondent Frances Clement is Superintendent of the Bedford Hills Correctional Facility, located within the Southern District of New York, where petitioners Carmona and Foggie are presently incarcerated. As such she has custody of them pursuant to New York Correction Law §§18 and 72.

12. Respondent Frank Caldwell is Acting Chairman of respondent New York State Board of Parole.

13. The New York State Board of Parole determines if members of the class are ever released from prison, and if so, at what time. It has lifetime custody of all members of the class who are released from prison, pursuant to the lifetime parole provisions of New York Correction Law §212(6) and (8).

IV. CLASS ACTION ALLEGATIONS

14. Petitioners Martha Carmona and Donna Foggie bring this action on behalf of themselves and all other persons similarly situated, pursuant to Rule 23(b)(1) and (2) of the Federal Rules of Civil Procedure, and the Court's power pursuant to 28 U.S.C. §1651.

15. The class of petitioners consists of all persons convicted under the 1973 drug law as described in paragraph 24 infra.

16. It is impossible to enumerate with any precision the members of the class of petitioners, but it is clear that the class is so numerous that joinder of all members is impracticable. For example, over 500 persons were convicted of A felonies under the 1973 drug law in the first half of 1975.

17. Carmona and Foggie will fairly and adequately represent the interests of the class. Like all other members of the class, petitioners have received lengthy indeterminate sentences with life maximums, and will be subject to lifetime parole surveillance if ever released from prison. Foggie was not permitted by the 1973 drug law to plead guilty to a charge less than an A-III felony. Foggie has been denied bail pending appeal pursuant to the law's mandatory provisions. Carmona received a less favorable plea bargain than dictated by the nature of her background and her alleged offense because she could not supply sufficient information to the District Attorney to induce him to recommend a sentence of probation.

18. The prosecution of separate actions by individual members of petitioners' class would create a risk of inconsistent or varying adjudications with respect to individual members of petitioners' class which would establish incompatible standards of conduct for respondents.

19. Respondents have acted or refused to act on grounds relating to the federal unconstitutionality of the 1973 drug law generally applicable to the class of petitioners.

20. Respondent Frances Clement is sued in her individual capacity as superintendent of the correctional facility in which the named petitioners are incarcerated, and as representative of the superintendents of all correctional institutions in New York State where persons convicted under the 1973 drug law are in custody.

21. Respondent Clement will fairly and adequately represent the interests of this class of respondents. She will by law be represented by the Attorney General of the State of New York who must by law also represent the other members of this class.

22. There are approximately 20 superintendents of correctional institutions who may at various times have within their custody members of petitioners' class. Joinder of all members of this class of respondents would be impracticable and would serve no useful purpose.

23. The questions of law and fact common to the class include the following:

a) Whether the 1973 drug law is violative of the Equal Protection, Due Process, and Cruel and Unusual Punishment Clauses of the Eighth and Fourteenth Amendments of the United States Constitution in that:

(1) New York Penal Law §§220.39(1); 220.41(1); 220.43; 220.18(1) and 220.21 provide for a mandatory maximum sentence of life imprisonment and a mandatory minimum sentence ranging from one to 25 years for all A felony drug offenders;

(2) New York Correction Law §§212(6) and (8) provide for the imposition of lifetime parole supervision with no possibility of discharge solely for persons convicted of narcotics-related Class A felonies;

(3) New York Criminal Procedure Law §220.10(6) provides restrictions on plea bargaining, unique to narcotics-related cases;

(4) New York Penal Law §65 provides that probation may be granted only to those persons convicted of Class A-III felonies for whom the prosecutor recommends such a sentence on the grounds that the defendant is cooperating or providing material assistance to the prosecution;

(5) New York Criminal Procedure Law §530.50 denies bail pending appeal to all persons convicted under the 1973 drug law;

b) What the manner of enforcement and administration of the 1973 drug law has been thus far.

c) What the impact of the 1973 drug law has been thus far.

d) What relief would be appropriate.

V. THE 1973 DRUG LAW

24. The specific sections of New York law challenged and referred to herein as the 1973 drug law and which petitioners allege result in their unlawful custody are the following:

a) Penal Law §220.39(1) providing that the sale of any amount of a narcotic drug is an A-III felony, punishable by a mandatory indeterminate sentence of one year to life;

b) Penal Law §220.41(1) providing that the sale of any substance of an aggregate weight of one-eighth ounce containing any amount of a narcotic drug is an A-II felony, punishable by a mandatory indeterminate sentence of 6 to 8 1/3 years to life;

c) Penal Law §220.43 providing that the sale of any substance of an aggregate weight of one ounce containing any amount of a narcotic drug is an A-I felony, punishable by a mandatory indeterminate sentence of 15 to 25 years to life;

d) Penal Law §220.18(1) providing that the unauthorized possession of any substance of an aggregate weight of one ounce containing any amount of a narcotic drug is an A-II felony, punishable by a mandatory indeterminate sentence of 6 to 8 1/3 years to life;

e) Penal Law §220.21 providing that the unauthorized possession of any substance of an aggregate weight of two ounces containing any amount of a narcotic drug is an A-I felony, punishable by a mandatory indeterminate sentence of 15 to 25 years to life;

f) Correction Law §212(6) and (8) (referred to herein as the "lifetime parole" provisions) insofar as they together provide that all persons released from correctional institutions shall be subject to parole supervision until the expiration of their maximum term, but permitting the Parole Board to grant an absolute

discharge from parole after five years of unrevoked parole to any felon except persons convicted under the 1973 drug law;

g) Criminal Procedure Law §220.30(3)(b)(i) providing that no plea of guilty to a charge less than an A-III felony may be offered in satisfaction of any indictment charging one of the felonies described in sub-paragraphs (a) through (e) supra;

h) Penal Law §65(1)(b) providing that the only persons convicted under the 1973 drug law who may be sentenced to probation are persons for whom the district attorney recommends such a sentence on the grounds the defendant has cooperated or is providing assistance in law enforcement efforts;

i) Criminal Procedure Law §530.50 insofar as it denies bail pending appeal to all persons convicted under the 1973 drug law.

25. The arbitrary and capricious nature of the 1973 drug law is demonstrated by the fact that despite its extraordinarily harsh provisions, it has had no measurable success in deterring narcotics use or traffic in New York State, or in reducing the level of violent or other crime. Indeed, drug traffic has dramatically increased in New York State since the advent of the law. The law has had a negative impact on law enforcement efforts in that it has diverted law enforcement resources from more serious drug and other offenses to relatively minor drug offenses and offenders. It has subjected addicts-in-treatment and others capable of leading productive lives in society to penalties which effectively foreclose that possibility. It has resulted in a dramatic increase in the number of defendants requesting trials in the Supreme Court of New York, and in court backlogs and delays.

VI. FACTUAL ALLEGATIONS

Martha Carmona

26. Petitioner Martha Carmona is a 37-year-old woman who has lived in New York City since she was approximately two years old. She has a nineteen-year-old daughter whom she supported until she was arrested on the charges described herein.

27. Carmona was a law abiding citizen and a stable and contributing member of her community until the events which gave rise to the charges described herein. She has no prior record of convictions and no prior record of arrests save for one arrest in 1956 for assault which arose from a dispute with a neighbor in which all parties were booked and all charges were ultimately dismissed.

28. Carmona's sole involvement with drugs came during a brief period around the time of her arrest when she yielded to pressure placed on her by her then boyfriend.

29. In early 1974, Carmona was arrested. Bronx County Assistant District Attorney Peter Greshman told petitioner she would be released on bail and that she would be expected to set up other persons for drug arrests. Carmona did not possess sufficient information to be able to qualify for a district attorney's recommendation of probation pursuant to Penal Law §65(1)(b). Moreover, Carmona feared for her physical safety and that of her daughter. Accordingly Carmona could not and in fact did not furnish the information and set ups the Assistant District Attorney wanted.

30. In July of 1974, Carmona was rearrested and charged in three New York State indictments in connection with the conduct for which she had initially been arrested. Solely because of Carmona's failure to provide information or to set up arrests, Assistant District Attorney Greshman refused to allow petitioner Carmona to plead guilty to a charge less than an A-II felony, although the nature of her background and the alleged offense were such that in the absence of this failure, a plea to an A-III felony would have been in accord with the general practice of the Bronx District Attorney's office.

31. On January 31, 1975, Carmona pleaded guilty before Justice Joseph Cohen of the Supreme Court, Bronx County, to the crime of criminal possession of a controlled substance in the second degree, to-wit possession of one ounce of cocaine, an A-II felony under the 1973 drug law.

32. On March 10, 1975, Carmona was sentenced to a term of six years to life, the minimum sentence permissible under the law for that crime. A notice of appeal was filed on her behalf, but no appeal has been perfected since the only grounds for challenge to her conviction would be those raised herein and already resolved against her by the New York Court of Appeals.

Donna Foggie

33. Petitioner Donna Foggie is a 21-year-old woman who was born in New York City. She was a battered and neglected child, abandoned by her mother and raised by an aunt.

34. Foggie became a heroin addict at the age of 15, and used heroin off and on subsequent to that time. At the time of her arrest she had entered a methadone maintenance treatment program and was raising her six-year-old son.

35. Foggie has no prior record of arrests or convictions.

36. In mid-1974, Foggie was arrested and charged with the sale of \$40.00 worth of cocaine, an A-III felony under the 1973 drug law.

37. In April of 1975, Foggie was convicted of the charges against her before Justice Eugene R. Canudo of the Supreme Court, Kings County.

38. On April 28, 1975, Foggie was sentenced to a term of one year to life, the minimum sentence permissible under the law for an A-III felony. At the time of sentencing, Judge Canudo indicated that he was giving Foggie the most lenient treatment permitted by law, and that the probation report and the recommendation of the District Attorney were in accord with this treatment.

39. Foggie had been admitted to bail both preceding and during her trial. Following her conviction, Justice Canudo continued her on bail pursuant to Criminal Procedure Law §460.50 until he was informed that Criminal Procedure Law §530.50 denied bail pending appeal to all persons convicted under the 1973 drug law. At that time he remanded Foggie to jail although he explicitly stated that he still considered her a good bail risk and was remanding her solely because he felt bound by the law to do so. At all times when Foggie was out on bail including the period of nearly a year between arrest and trial, she consistently appeared in court.

40. Petitioner Foggie has appealed a number of trial errors, and stands a substantial chance of reversal of the conviction on appeal. Although she has been incarcerated at Bedford Hills since early May, 1975, her appeal has not yet been briefed or argued in the Appellate Division, Second Department. Accordingly, it appears virtually certain that she will have fully served her minimum one year sentence before any decision on her appeal could be rendered, unless released on bail.

VII. EXHAUSTION OF STATE REMEDIES

41. Petitioners Carmona and Foggie have not personally exhausted state remedies pursuant to 28 U.S.C. §2254 because it would be futile to do so. All of the issues raised by this petition save for the constitutionality of the denial of bail pending appeal were raised before the New York Court of Appeals earlier this year in a group of criminal appeals consolidated for argument before that Court on March 24, 1975, and decided adversely by the New York Court of Appeals on June 18, 1975, under the name People v. Broadie, 37 N.Y. 2d 100, 371 NYS 2d 471 (1975). Accordingly, any further consideration given the issues raised by this petition by the courts of New York State would be summary. Moreover, the eight criminal defendants whose appeals were heard by the New York Court of Appeals in the Broadie group of cases are themselves members of petitioners' class, and have fully exhausted their state remedies.

42. Any further exhaustion of state remedies would be additionally futile and unjust because of the 1973 drug law's provision precluding bail pending appeal. That provision means

that many members of petitioners' class if required to exhaust their individual appeal rights under New York law will remain incarcerated until they have served their minimum prison sentences without ever having had an opportunity to raise in federal court the constitutional challenges to the drug law already rejected by the State's highest court.

43. There is no adequate state remedy whereby Petitioner Foggie can challenge the unconstitutional denial of bail pending appeal.

VIII. VIOLATIONS OF LAW

44. The 1973 drug law both on its face and as applied to petitioners and members of their class violates the Equal Protection, Due Process, and Cruel and Unusual Punishment Clauses of the Eighth and Fourteenth Amendments to the United States Constitution in that

a) The harsh mandatory minimums, mandatory life maximums, and lifetime parole surveillance with no possibility of discharge are so severe as to be degrading to the dignity of human beings, are arbitrarily inflicted on a small group of persons, are unacceptable to contemporary society, are disproportionate and excessive, are more severe than the punishment accorded any other convicted felon in New York State, including murderers, rapists, and arsonists, and preclude adequate consideration of the individual background of the offender or circumstances of the offense without rational connection to any legitimate state interest;

b) The restriction on permissible pleas of guilty in narcotics-related cases bears no rational relationship to any legitimate state interest, and singles out persons accused of A-III felonies for the harshest treatment accorded any accused persons in

New York State, including persons accused of more serious drug crimes and persons accused of crimes of violence such as murder, arson and rape;

c) The imposition of lifetime parole with no possibility of discharge solely on persons convicted of narcotics related felonies but not on other A felons such as murderers, rapists and arsonists, is so severe as to be degrading to the dignity of human beings, is arbitrarily inflicted on a small group of persons, is unacceptable to contemporary society, is disproportionate and excessive, bears no rational relationship to any legitimate state interest, establishes an irrebutable presumption that persons convicted of any narcotics related felony can never be rehabilitated and will forever be a danger to society, and imposes an excessive restraint on individual liberty without securing any legitimate state purpose;

d) Authorizing a sentence of probation solely for those persons convicted of an A-III felony for whom the prosecutor recommends such a sentence transfers the sentencing function from the judiciary to the prosecution, establishes an arbitrary and irrational classification of persons eligible for probation, and without rational justification provides discretion to impose less severe penalties solely on persons who have more serious criminal contacts and involvement than persons punished more severely;

e) The automatic denial of bail pending appeal to all persons convicted of A felonies bears no rational relationship to any legitimate state interest, singles out persons convicted of drug law A-III felonies for treatment different from persons with comparable minimum sentences under New York law without rational

justification, and prevents petitioner Foggie and other A-III felons from pursuing an effective appeal.

PRAYER FOR RELIEF

WHEREFORE petitioners individually and on behalf of all others similarly situated, respectfully pray that this Court:

- A. Grant the petition for writs of habeas corpus;
- B. Hold an evidentiary hearing on the allegations of this petition;
- C. Enter an order discharging petitioners from custody;
- D. Allow petitioners to prosecute this action in forma pauperis;
- E. Award petitioners costs, including disbursements and reasonable attorneys' fees, including such rights as petitioners may have pursuant to the Criminal Justice Act;
- F. Grant preliminary relief to petitioner Foggie on her claim that the denial of bail pending appeal is unconstitutional;
- G. Grant such other and further relief as may be proper.

Respectfully submitted,

Elizabeth B. DuBois

ELIZABETH B. DuBOIS
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New York, New York 10017

Dated: New York, New York
December 10, 1975

VERIFICATION

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

ELIZABETH B. DuBOIS, being duly sworn, says that she is an attorney admitted to practice in the federal courts of the Southern District of New York; that she is one of the attorneys for petitioners herein; that she has prepared and read the foregoing petition for writs of habeas corpus, and the allegations contained therein are true, to the best of her knowledge, information, and belief.

Elizabeth B. DuBois

Sworn to before me this
10th day of December, 1975

Mark Charles Moore
Notary Public

LARRY CHARLES MARCH,
Husband, State of New York
No. C-107-33023
County of New York County
March 23, 1975

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
Roberta Fowler,

Petitioner,

v.

Benjamin Ward
State Commissioner of Corrections

and

Frances Clement
Superintendent, Bedford Hills
Correctional Facility,

Respondents.
-----X

PETITION FOR A
WRIT OF
HABEAS CORPUS

PRELIMINARY STATEMENT

1. This is a habeas corpus proceeding brought to challenge the imprisonment of the Petitioner by the Respondents in the New York prison facility at Bedford Hills, New York, for an indefinite term of from four years to life, pursuant to a judgment of conviction entered February 21, 1974. The basis for Petitioner's claim is that she has been convicted and sentenced to jail under various sections of the New York Penal Law, the New York Correction Law, and the New York Criminal Procedure Law which are unconstitutional in that:

a. §§ 220.39(1) and 70.00(2) of the Penal Law, which require the imposition of a life sentence for the sale

of any amount of a substance containing a narcotic drug, violate the Petitioner's right to equal protection of the laws and due process of law, guaranteed by the Fourteenth Amendment to the United States Constitution; further, said provisions constitute cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution.

b. § 220.10(6) of the Criminal Procedure Law, which totally excludes from the plea bargaining process only those individuals charged with Class A-3 felony offenses (i.e. possession or sale of relatively small quantities of narcotics), arbitrarily and unreasonably discriminates against the members of Petitioner's class in violation of their right to equal protection of the laws guaranteed by the Fourteenth Amendment.

c. § 212(8) of the Correction Law, which requires that all persons convicted of Class A drug felonies must be subject to lifetime parole, violates the Petitioner's rights to equal protection of the laws and due process of law, guaranteed by the Fourteenth Amendment; further, said provision constitutes cruel and unusual punishment in violation of the Eighth Amendment.

JURISDICTION

2. This proceeding is brought under the authority of 28 U.S.C. §§ 2241 and 2254, which provide for federal court review of the Petitioner's claim that state custody of her

person has been procured by means contrary to the Constitution of the United States.

3. Petitioner has previously exhausted her state remedies. Her conviction has been appealed to the Court of Appeals of the State of New York, the highest court of that state. The court's decision is reported de sub nom. People v. Broadie, 37 N.Y.2d 100, 332 N.E.2d 338, 371 N.Y.S.2d 471 (1975). All of the questions raised herein were presented to the Court of Appeals.

PARTIES

4. Roberta Fowler is twenty-one years old. She is presently an inmate at Bedford Hills Correctional Facility, Village of Bedford Hills, County of Westchester, State of New York, following her conviction for the sale of .13 grams (approximately one individual dose) of a substance containing cocaine.

Prior to her arrest on October 11, 1973, she had spent her entire life in Albany and in Sidney Center, New York. She completed eleven years of school. She has taken the high school equivalency examination while in prison and is awaiting the results. She has been employed by the New York State Department of Labor, the Eden Park Nursing Home, and the New York Telephone Company. She was married in 1969 to Billie Fowler and has two children; Teresa - age 4, and Billy - age 5. They are presently residing with the Petitioner's

father, William Smith, in Albany, New York. Throughout her incarceration, Petitioner has made diligent efforts to maintain close contact with her children. On her initiative, both nuns and guidance counselors from St. John's Day Care Center, which her children attend, have come to Bedford to discuss the children's progress with her. The children have visited her as frequently as possible, given the distance and expense involved. Prior to her arrest for the sale of cocaine, Petitioner had never been charged with the sale or possession of narcotics. She had never been charged with or convicted of a crime of violence. She had received psychiatric counseling while a teenager following the death of her mother. She also sought and obtained treatment at the Albany Medical Center Methadone Clinic during 1972. At the time of her arrest, Petitioner was not addicted to any narcotic drug. She is totally without funds or other assets.

5. Benjamin Ward is the Commissioner of Corrections of the State of New York. Frances Clement is the Superintendent of Bedford Hills Correctional Facility. These individuals have legal and physical custody of the person of the Petitioner.

THE NEW YORK STATUTE

6. In 1973, the State of New York enacted into law a new penalty structure to be applied to drug offenses. The major features of this enactment in relation to Petitioner's claim are:

a. All sales of narcotic drugs (including cocaine) constitute Class A felony offenses, punishable by an indeterminate sentence with a mandatory maximum term of life imprisonment. Penal Law §§ 220.39(1), 220.41(1), 220.43 and 70.00(2)(a).

b. Drug offenses within the Class A felony category are subdivided into three sub-classes, denominated Class A-1, A-2, and A-3 felonies. Although such offenses as Murder in the First Degree are included in the A-1 category, only drug offenses are included in the A-2 and A-3 categories of offenses.

c. Penal Law § 220.39(1) provides that the sale of any quantity of a substance containing a narcotic drug, such as cocaine, constitutes a Class A-3 felony. Penal Law § 70.00 (2)(a) provides that all Class A felonies are punishable by a mandatory sentence carrying a maximum of life imprisonment. Penal Law § 70.00(3)(a)(iii) provides that the minimum sentence for a class A-3 felony conviction is from one year to eight years and four months, in the discretion of the court.

d. Correction Law § 212(8) specifically excepts only Class A felony drug offenses from the general power of the Board of Parole to terminate any sentence upon the completion of five years of unrevoked parole. Thus, all persons convicted of Class A felony drug offenses must remain on parole for the rest of their lives.

e. Criminal Procedure Law § 220.30(3)(b)(i) provides that, in the case of drug offenses only, an indictment charging a Class A felony may only be satisfied by a plea of guilty to a Class A felony. Thus, persons, such as Petitioner, charged with a Class A-3 felony drug offense, must either plead guilty to the offense charged in the indictment or go to trial. All

other offenders, including those charged with the more serious Class A-1 and A-2 drug offenses, may plead guilty to a lesser charge.

f. Penal Law § 65(1)(b) vests the prosecutor, and only the prosecutor, with authority to recommend a sentence of probation for those who have cooperated with or are providing assistance to law enforcement officials.

FACTS

7. The Petitioner was charged with the sale of .13 grams of a substance containing cocaine, in violation of § 220.39(1) of the Penal Law. This quantity of cocaine constitutes a single individual dose. The prosecution relied upon the following allegations at trial in support of this charge: On September 25, 1973, James Werthmuller, an undercover agent, observed Roberta Fowler at an Albany police station. He asked her if she could get him twenty dollars worth of cocaine and then gave her twenty dollars (\$20.00). She then left in a car with one Jerome Powell, a government informer. Twenty minutes later, all three individuals met again by pre-arrangement at a different location. The Petitioner got out of the car and dropped something into Powell's hand, who in turn handed it to Werthmuller. The substance contained cocaine.

THE TRIAL

8. During the jury trial held in February, 1974, the court committed several errors of law, which singly and cumulatively caused Petitioner to be denied her right to a fair trial. These errors were:

a. Permitting the prosecutor, during cross-examination of a defense witness, to make said witness a prosecution witness and to reopen the prosecution case during the middle of the defendant's presentation of evidence.

b. Refusing to grant the defendant's requested charge to the jury instructing them on the defense of agency.

c. Failing to suppress the identification and the admission into evidence at trial of identification testimony and a photograph of the Petitioner, when such evidence was obtained in violation of the Petitioner's constitutional rights.

d. In addition, the prosecution suppressed the production of a material witness and therefore deprived the Petitioner of her right to a fair trial and to due process of law.

THE SENTENCE

9. On February 21, 1974, the Petitioner, then twenty years of age, and with no previous record of violent behavior or of criminal possession or sale of narcotics, was sentenced to a maximum term of life imprisonment, as required by Penal Law § 70.00(2)(a), for the sale of one individual dose of co-

caine to an undercover agent. The court, exercising its discretion to impose a minimum term of from one year to eight years, four months, set the minimum term at four years. The Petitioner will not be eligible for release from prison prior to October 11, 1977.

LIFETIME PAROLE

10. As alleged in ¶6(d), the Petitioner and all other persons convicted of Class A felony drug offenses are subject to mandatory lifetime parole. Pursuant to Correction Law § 213, the Board of Parole is possessed of virtually unfettered discretion in determining whether an individual should be released from jail prior to serving the maximum term. Thus, the Petitioner may remain in prison for the rest of her life in the discretion of administrative authorities. If she is released on parole, she must comply with a great number of onerous requirements, which infringe or deprive her of basic civil rights and civil liberties, until the day she dies. These conditions, imposed upon all parolees under the authority of Correction Law § 215, are enumerated in 7 N.Y.C.R.R. § 1.15, and include:

- a. Parolees may not leave the State, or any area defined by the parole officer in writing, without written permission from the parole officer.
- b. Parolees must 'fully comply' with the 'instructions' of the parole officer. Parolees must report when and as required. Any false report may be grounds for revocation of parole.

- c. Parolees must permit parole officers to visit them at home or at work.
- d. Parolees must obtain prior permission before they move.
- e. A parolee may be searched, including person and property, at any time by the parole officer in his discretion.
- f. Parolees may be required to observe a curfew.
- g. Parolees may be required to stop drinking.
- h. Parolees may not quit their job without prior permission from their parole officer.
- i. Parolees must obtain permission from their parole officer to own a car or get a driver's license.

Finally, parole may be revoked in the discretion of the Parole Board for a violation of any of the conditions of parole pursuant to Correction Law § 215, which may result in the parolee serving the original maximum term, that is, life imprisonment.

PLEA BARGAINING

11. In the State of New York, the great majority of felony indictments are satisfied by a plea of guilty to a lesser charge than the charge in the indictment. A representative sample is provided by dispositions of cases in which defendants in the New York criminal courts for Bronx and New York counties were represented by counsel assigned under Article 18-B of the County Law § 722ff. For the year ended June 30, 1975, of 3,335 felony cases disposed of on the merits,

2,894 involved pleas to reduced charges, 92 involved pleas to the original charge, and only 349 cases were tried. The only defendants in the criminal justice system in the State of New York who are forbidden by law to plead guilty to a reduced charge are those charged with a Class A-3 felony drug offense; even those charged with possession and sale of greater quantities of narcotic drugs, and thus with a Class A-1 or A-2 drug offense, may participate in the plea bargaining process. This statutory scheme places an additional and unfair burden upon the defendant and counsel in light of the view openly held by some judges that defendants who go to trial should, and do, receive heavier sentences than those who plead guilty. See, e.g., Frankel, Criminal Sentences (Hill & Wang, 1973) p. 25.

CLAIMS FOR RELIEF

12. First Claim for Relief. §§ 220.39(1) and 70.00 (2)(a) of the New York Penal Law, which impose a mandatory term of life imprisonment for the sale of any amount of a substance containing a narcotic drug, including cocaine, are arbitrary and capricious and deny to persons convicted and sentenced thereunder the right to equal protection of the laws guaranteed by the Fourteenth Amendment to the United States Constitution. Under the New York drug laws, the sale of a single individual dose of cocaine is classified as an A felony and thus is punished more severely than all of the following offenses:

Voluntary Manslaughter (B felony, Penal Law § 125.20)

Forcible Rape (B felony, Penal Law § 130.35)

Sodomy upon a child less than eleven years old (B felony, Penal Law § 130.50[3])

Burglary while armed or causing injury (B felony, Penal Law § 140.30)

Arson to an occupied building (B felony, Penal Law § 150.15)

Grand Larceny by Extortion (C felony, Penal Law § 155.40)

Possession of Explosives with intent to use unlawfully (B felony, Penal Law § 265.04)

Possession of a machine gun with intent to use unlawfully (C felony, Penal Law § 265.03).

No minimum term of imprisonment is required for a Class B or lesser felony. The maximum term for a Class B felony is 25 years. Penal Law §§ 60.05, 70.00. This statutory classification is arbitrary and capricious, serves no rational purpose, constitutes an invidious discrimination, and denies to those convicted under its provisions the equal protection of the laws.

13. Second Claim for Relief. The punishment imposed by Penal Law §§ 220.39(1) and 70.00(2)(a) for sale of any quantity of a substance containing a narcotic drug, including cocaine, is so disproportionately severe when compared to other offenses within New York, to punishment for the same or similar offenses in other jurisdictions, and in relation to the severity of the harm caused by the offense as to constitute cruel and unusual punishment in violation of the Eighth Amendment to the United

States Constitution.

14. Third Claim for Relief. § 220.10(6) provides that in the case of Class A felony drug offenses only, an indictment may be not be satisfied by a plea of guilty to an offense lower than a Class A felony. In the case of those charged with a Class A-3 felony, the indictment may be satisfied only by a plea of guilty to the offense charged. This statutory classification is arbitrary and capricious in two respects:

a. The classification creates two classes of drug offenders: those charged with a Class A-3 felony drug offense, and those charged with a more serious Class A-1 or A-2 felony drug offense. Members of the former class are denied the opportunity to plead guilty to any lesser charge, while those in the latter class may plead guilty to a Class A-3 felony. Therefore, those charged with possession or sale of relatively smaller quantities of narcotics are treated more severely than those charged with possession or sale of larger quantities.

b. The classification creates two classes of offenders: those charged with Class A felony drug offenses, and all other offenders. Members in the former class are denied the opportunity to plead guilty to any charge less than a Class A felony. Members of the latter class may plead guilty to a lesser included offense, including a misdemeanor or violation, in the discretion of the prosecutor and the court. Therefore, an individual charged with Murder in the Second Degree may

plead guilty to a lesser included offense, while a person charged with selling one individual dose of a substance containing cocaine must plead guilty to a Class A felony or go to trial.

Under either of the above analyses, persons charged with Class A-3 felony drug offenses are members of a class created by a statutory scheme which is arbitrary and capricious, which invidiously discriminates against members of Petitioner's class, and which bears no rational relationship to the statute's stated purpose to deter the commission of offenses, rehabilitate offenders, and protect the public (Penal Law § 1.05[5]).

15. Fourth Claim for Relief. § 212(8) of the Correction Law creates two classes of offenders: all those charged with Class A felony drug offenses, and all other offenders. Members of the former class, including persons charged with the sale of an individual dose of a substance containing cocaine, must remain subject to the ignominy and severe restrictions of parole for the rest of their lives, assuming they are released from prison at all. Members of the latter class, including murderers, may be discharged from all supervision upon the completion of five years of unrevoked parole in the discretion of the Board of Parole. This classification is arbitrary and capricious, serves no rational purpose, constitutes an invidious discrimination, and denies to those convict-

ed and sentenced under its terms the equal protection of the laws.

16. Fifth Claim for Relief. The lifetime parole provisions described in §§ 6(d) and 10, supra, although containing the possibility for release from confinement to prison in the discretion of parole authorities, impose upon such release conditions so onerous and oppressive over the entire lifetime of the individual as to constitute a grossly disproportionate sentence and cruel and unusual punishment in violation of the Eighth Amendment.

17. Sixth Claim for Relief. During the course of the proceedings in the state court, errors were committed which, separately and cumulatively, denied to Petitioner a fair trial in violation of her right to due process of law under the Fourteenth Amendment to the United States Constitution. These errors are described in §§ 7 and 8, supra.

PRAYER FOR RELIEF

WHEREFORE, Petitioner respectfully prays that this court:

- a. Grant the petition for a writ of habeas corpus.
- b. Hold an evidentiary hearing on the allegations of this petition.
- c. Enter an order discharging the Petitioner from custody.

d. Allow the Petitioner to prosecute this action
in forma pauperis.

e. Award the Petitioner costs, including disbursements and reasonable attorneys' fees, including such rights as Petitioner may have pursuant to the Criminal Justice Act.

f. Grant such other and further relief as may be just.

Dated: New York, New York
January , 1976

Respectfully submitted,

E. JUDSON JENNINGS, ESQ.
CHARLES D. TERRY, ESQ.
(Washington Square Legal Services, Inc., a not-for-profit legal services corporation permitted to practice law pursuant to order of the New York Supreme Court and §§ 478 and 484 of the Judiciary Law).

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Attorneys for Petitioner

Peter Bickerman, Law Clerk

VERIFICATION

STATE OF NEW YORK)
 : ss.:
COUNTY OF NEW YORK)

E. JUDSON JENNINGS, being duly sworn, deposes and says that he is an attorney admitted to practice in the federal courts of the Southern District of New York; that he is the attorney for the Petitioner herein; that he has prepared and read the foregoing petition for a writ of habeas corpus, and the allegations contained therein are true to the best of his knowledge, information and belief.

E. JUDSON JENNINGS, ESQ.

Sworn to before me this
day of January, 1976

NOTARY PUBLIC

JUG 5 1977

NEW YORK CITY OFFICE

ATTORNEY GENERAL

Petitioners.

-against-

BENJAMIN WARD, Commissioner of the New York State Department of Correctional Services; FRANCES CLEMENT, Superintendent, Bedford Hills Correctional Facility, Bedford Hills, New York; EDWARD HAMMOCK, Chairman of the New York State Board of Parole; and the NEW YORK STATE BOARD OF PAROLE.

Respondents.

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CONSTANCE BAKER MOTLEY, D. J.

FINDINGS OF FACT AND CONCLUSIONS

OF LAW

This is a habeas corpus proceeding brought by ^{1/}three women challenging the constitutionality of their confinement pursuant to judgments of conviction in the New York courts. Specifically, they attack, root and branch, the constitutionality of certain sections of the New York Penal Law, Criminal Procedure Law, and Correction Law, as amended in 1973, ^{2/} which govern the treatment of class A felony drug offenders, and pursuant to which they have been sentenced. The court finds it unnecessary, for reasons set forth infra, to discuss all the arguments which they raise. The court holds that Ms. Carmona's and Ms. Fowler's sentences are so disproportionately severe in relation to the gravity of the offenses charged as to constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution. However, the court finds no constitutional infirmity in Ms. Foggie's conviction and sentence.

THE PETITIONERS

Petitioner Martha Carmona is presently serving a sentence of six years to life imprisonment for the crime of criminal possession of a controlled substance in the second degree,

to wit, possession of more than one ounce of cocaine, an A-II felony under the 1973 drug law.^{3/} The sentence is the minimum possible unde^{4/} the law.

Ms. Carmona is a forty-one year old woman who, though born in Puerto Rico, has lived in New York City since early childhood. As a child, she was given by her married parents to an aunt, who emigrated to New York and raised her in that city. In 1953, she dropped out of high school, assertedly in order to earn money to send to her parents in Puerto Rico. After dropping out of school, she had worked from 1960 to 1973 as a sewing machine operator for a garment manufacturer, and from 1973 until her arrest in 1974, she worked part time for a beauty salon in Manhattan. Though presently unmarried (she was married at age 18 and divorced a year later), she has a daughter approximately twenty-one years old whom she was supporting until her arrest on the instant charges in 1974. The daughter subsequently had to resort to public assistance.

Prior to the events which gave rise to the instant charges, Ms. Carmona had never been convicted of a crime and had only once been arrested — in 1956 — when a dispute with a neighbor resulted in the arrest of all parties on assault charges which were ultimately dismissed.

In 1974, Ms. Carmona was arrested on a series of drug-related charges although she herself was not an addict. In May, she was indicted on federal charges of conspiracy and two

substantive counts of possession of cocaine with intent to distribute it. The charges were ultimately satisfied by a guilty plea to one substantive count. On August 13, 1974, Ms. Carmona was indicted by a state grand jury in Bronx County on charges based upon the results of a search of her apartment conducted on July 30, 1974. The indictment charged her with violation of several penal statutes due to her alleged possession of items of drug paraphernalia, a small quantity of marijuana, and 3 and 3/8 ounces of cocaine, the latter offense (criminal possession of a controlled substance in the first degree) constituting an A-I felony in New York^{5/} with a mandatory sentence of at least fifteen years to life.^{6/} At the time of her arrest, she made a recorded statement to the Assistant District Attorney in charge of the case admitting possession of the cocaine which she had been given by another man on consignment for future sale. Ms. Carmona had earlier in 1974 been charged in two state indictments which, together, alleged that she had sold some 7 and 7/8 ounces of heroin to undercover agents.

On several occasions after her arrest, Ms. Carmona indicated to police and prosecutorial officials that she wished to cooperate with them by supplying information and thereby becoming eligible for the District Attorney's recommendation that she be placed on lifetime probation, rather than facing the harsh penalties attendant to the offenses for which she was charged.^{7/} However, all the information which she provided the

authorities was already known to them and, therefore, of little utility. When she was asked to introduce an undercover agent to her source of narcotic supply, she declined to do so on the ground that she feared for the physical safety of herself and her daughter. Because of her failure to provide any material assistance to the District Attorney's office, Ms. Carmona was not considered an appropriate subject for the probation recommendation. In consequence, after consultation with retained counsel, she accepted an offer to plead guilty to the A-II charge of possession of a controlled substance (cocaine) in the second degree, in satisfaction of all the outstanding charges against her. On January 31, 1975, her plea was accepted by Justice Joseph Cohen of the Supreme Court, Bronx County and, on March 10, 1975, she was sentenced to the term of imprisonment previously set forth. Her appeal was denied by the Appellate Division, First Department in late 1976, and leave to appeal to the New York Court of Appeals was denied. She is presently incarcerated in the Bedford Hills Correctional Facility of which respondent Frances Clement is Superintendent.

Petitioner Donna Foggie is presently on mandatory life-time parole,^{8/} having been discharged from incarceration after serving roughly one year of a one year to life sentence for the crime of criminal possession of a controlled substance in the third degree, to wit, sale of 18 grains (\$40.00 worth) of cocaine an A-III felony under the 1973 drug law.^{9/} The sentence is the

minimum possible under the law. ^{10/}

Ms. Foggie is a twenty-five year old woman born and raised in New York City. After her parents separated when she was three years old, she was raised by her mother, with whom she maintains a close relationship. She also remains close to her brother, who is a Sargeant in the Air Force. She dropped out of high school in Brooklyn during her tenth grade, and soon thereafter was married in 1969. Although she was separated from her husband in 1970, she retained custody of their child, a son who is now about eight years old. After leaving high school she held a number of jobs for short periods of time. However, from 1970 until the time of her arrest, she was receiving public assistance.

Ms. Foggie first became a heroin addict at the age of 15, and used heroin intermittently subsequent to that time. On August 20, 1970, she voluntarily committed herself to a drug treatment program at the Drug Abuse Service Bushwick Center in Brooklyn. She was discharged from the program on July 24, 1974, having reported regularly while on after-care treatment and having made a "satisfactory adjustment". After her discharge from the program, she continued her rehabilitation therapy in two other methadone programs.

Prior to 1974, Ms. Foggie had never been convicted of a criminal offense. In February of 1970, she had been arrested and charged with possession of a dangerous drug in the sixth

degree and petit larceny; however, those charges were dismissed in Kings County Criminal Court in 1971.

On August 8, 1974, Ms. Foggie was arrested. An indictment was filed on August 16, 1974 charging her with two counts of criminal sale of a controlled substance in the third degree, two counts of possession of a controlled substance in the third degree, and two counts of possession of a controlled substance in the seventh degree. The charges arose from two separate events: a sale of \$50 worth of a substance containing cocaine on or about May 8, 1974, and a sale of \$40 worth (18 grains) of a substance containing cocaine on or about May 17, 1974, on each occasion to an undercover agent. The charges resulting from the May 8, 1974 transaction were dismissed by the court upon the prosecutor's refusal to produce the informant who introduced Ms. Foggie to the undercover officer to whom she allegedly made the sale. After a jury trial before Justice Eugene R. Canudo of Supreme Court, Kings County, she was convicted on one count of the indictment, which charged her with the sale occurring on May 17, 1974. On April 28, 1975, she was sentenced to a term of one year to life by Judge Canudo, who indicated that his sentence, the most lenient permitted by the 1973 drug law, was in accordance with both the contents of the probation report and the recommendation of the Assistant District Attorney in charge of the case. Her appeal, alleging a number of trial errors, was denied by the Appellate

Division, Second Department, on June 3, 1977, some time after she had already been released on lifetime parole.

Petitioner-intervenor Roberta Fowler is presently serving a sentence of four years to life imprisonment in Bedford Hills Correctional Facility for the crime of criminal sale of a controlled substance in the third degree, ^{11/} to wit, approximately one individual dose of a substance containing cocaine.

Ms. Fowler, now approximately twenty-three years old, had spent her entire life prior to her arrest in Albany and Sidney Center, New York. Her mother died while she was a teenager, and she received psychiatric counseling for some time thereafter. She completed eleven years of school and, while in prison, has since taken the high school equivalency examination. She has, for varying periods of time, been employed by the New York State Department of Labor, the Eden Park Nursing Home, and the New York Telephone Company. In 1969, she was married to Billie Fowler, and she now has two children who, during her incarceration, reside with her father in Albany. Since her imprisonment for the instant offense, she has apparently made diligent efforts to maintain close contact with her children. On her initiative, both nuns and guidance counselors from the day care center which her children attend have come to Bedford Hills to discuss the children's progress with her. The children have visited her relatively frequently.

The offense for which Ms. Fowler is incarcerated occurred on September 25, 1973. At trial, the Government established that, on that date, one James Werthmuller, an undercover agent, observed the petitioner at an Albany police station, asked her whether she could get him twenty dollars worth of cocaine, and then gave her twenty dollars. Ms. Fowler then left in a car with one Jerome Powell, a Government informer. Some twenty minutes later, the three individuals met again by pre-arrangement at a different location, at which point petitioner handed the substance containing cocaine to Powell, who, in turn, handed it to Werthmuller.

After a jury trial^{12/} in February, 1974, Ms. Fowler was sentenced, on February 21, 1974, to a term of four years to life, the court exercising its discretion to set a minimum term of from one year to eight years and four months. At the time of sentence, Ms. Fowler, then twenty years of age, had no previous record of violent behavior or of criminal possession or sale of narcotics, although she was not a stranger to the criminal justice system.^{13/} During 1972, she had sought and obtained treatment at a methadone clinic in Albany, but, at the time of her arrest, she was not addicted to any narcotic drug. Her conviction was appealed through the State court system, and was affirmed by the New York Court of Appeals sub nom. People v. Broadie, 371 N.Y.S.2d 471 (N.Y.), cert. denied, 423 U.S. 950 (1975).

EXHAUSTION OF STATE REMEDIES

The State argues at the outset that the claims raised by these petitioners have not been adequately presented to the New York courts to satisfy the exhaustion requirement embodied in 28 U.S.C. § 2254(b). Picard v. Connor, 404 U.S. 270 (1972). At least with regard to the grounds upon which it rests its decision, the court does not find this argument well taken.

The court here holds that, as applied to Ms. Carmona and Ms. Fowler and their offenses, certain provisions of the 1973 drug law are so disproportionately severe as to constitute cruel and unusual punishment. It is clear that the New York Court of Appeals, in upholding the constitutionality of the 1973 drug law, considered challenges to its validity under the Cruel and Unusual Punishments Clauses of both the New York and United States Constitutions. Broadie, supra, at 474. While the Court did not deal in depth with the personal backgrounds of the appellants or with the specific circumstances of the offenses there charged, a fair reading of the Court's opinion indicates that the Court of Appeals rejected the argument that the statutory punishments were constitutionally defective, either on their face or as applied. See especially Broadie, supra, at 475, 477, 482.

Chief Judge Breitel took pains to note that the Court's opinion did not imply that "in some rare case on its particular facts it may not be found that the statutes have been unconstitutionally applied." Broadie at 482. However, his citation to Justice Powell's dissenting opinion in Furman v. Georgia, 408 U.S. 238, 460-1 (1972) seems to make clear that the exception, in which application might be unconstitutional, contemplated circumstances in which the alleged crime "technically (fell) within the legislatively defined class but factually (fell) outside the likely legislative intent in creating the category." 408 U.S. at 461. The Court was concerned with the possible "accidental offender", not with a situation in which application of the statutory penalties to an offense concededly falling within the statutory definition merely created a disproportionately severe punishment.^{14/} Accordingly, it seems clear that Broadie rejected the argument that the 1973 drug law provisions constituted cruel and unusual punishment, both by their terms and as applied to factual patterns clearly encompassed by the Legislature's intent. It is also clear that the Broadie court rejected the Equal Protection challenge as well. 371 N.Y.S.2d. at 475.

Since Ms. Fowler's conviction was one of the cases affirmed by the Broadie opinion, it is obvious that she has exhausted her available state remedies. Moreover, since it also seems clear that it would be completely futile for either Ms.

Carmona or Ms. Foggie to pursue the same claims on direct appeal in the state courts, they need not do so before seeking relief in this court. ^{15/} United States ex rel. Sero v. Preiser, 506 F.2d 1115, 1130 (2d Cir. 1974), cert. denied, 421 U.S. 921 (1975).

The State apparently concedes the futility of raising any further constitutional claims in the state courts, insofar as they challenge the statutes' provisions on their face. ^{16/} However, to the extent that petitioners seek in this court, through an evidentiary hearing, to provide a factual predicate for their assertions that the law is arbitrary and ineffective in its impact, the State asserts that the New York courts should have the opportunity to pass upon such claims in the first instance, with the benefit of the evidentiary showing sought to be made here.

While appeals to principles of comity and federalism always have a persuasive ring in the context of federal habeas corpus proceedings, the court is not persuaded that further presentations to the New York courts ought to be required in this situation. This is not a case such as Needel v. Scafati, 412 F.2d 761 (1st Cir.), cert. denied, 396 U. S. 861 (1969), in which critical factual evidence going to the merits of a federal claim was presented for the first time to the federal court, and the state court had no opportunity to consider it. In that case and others, e.g., United States ex rel. Cleveland

v. Casscles, 479 F.2d 15 (2d Cir. 1973), the additional evidence adduced in the federal court was so significant as to essentially transform the nature of the claim originally presented in the state courts. Understandably, federal appellate courts have felt constrained in such situations to conclude that the state courts had not theretofore had a fair opportunity to consider the outlines of the ultimate federal claim. Picard v. Connor, supra.

However, this is a different type of case. It is not essentially a factual case, but a legal one. Indeed, the need for the factual hearing is so limited that petitioners have indicated their willingness to waive the hearing request if the court decided that the nature of the evidence to be adduced created an exhaustion problem.^{17/} Petitioners do not seek to bring to this court's attention new facts relating to the crimes which they allegedly committed, nor do they raise new claims relative to their personal situations or any alleged disparity between the magnitude of their offenses and the severity of the punishment. Instead, they seek to adduce some limited factual material most of which is not disputed by the State and much of which is in fact, obtained through State agencies and State officials, which would cast doubt upon some of the factual assumptions which the New York Court of Appeals relied upon in upholding the drug law against constitutional challenge. See, e.g., Broa supra, at 476-9.

In seeking to make this modest evidentiary showing concerning the operation of the law "in practice", petitioners ask no more than has been permitted in other federal habeas corpus cases without a requirement of further exhaustion. See Humphrey v. Cady, 405 U. S. 504, 508-512 (1972); United States ex rel. Sero v. Preiser, 372 F.Supp. 663, 670 (S.D.N.Y. 1974); Ford v. Hollowell, 385 F.Supp. 1392, 1397 (N.D. Miss. 1974). In this case, it seems clear that the legal issues sought to be raised are substantially the same as those raised before and considered by the New York Court of Appeals in Broadie. The limited factual presentation provided in this court as support for those claims does not so alter them as to require that the New York courts now be permitted to consider them afresh.^{18/} See Developments in the Law - Federal Habeas Corpus, 83 Harv. L. Rev. 1038, 1096 (1970)

THE MERITS

Petitioners have attacked the 1973 drug law in numerous respects, notably (1) the mandatory indeterminate life sentences for all class A drug offenders;^{19/} (2) the preclusion of plea bargaining for A-III felony offenders (which has been eliminated during the pendency of this action);^{20/} (3) the mandatory lifetime parole provision without possibility of discharge^{21/} (which has also been altered during the pendency of this action) to permit class A drug felons to be discharged from parole on

on the same basis as all other parolees); ^{22/}(4) the predication of probation, in part, upon a recommendation from the prosecutor due to the defendant's cooperation; ^{23/}and (5) the denial of bail pending appeal. ^{24/}Moreover, they have charged that, both on their face and also as enforced, these various provisions deny them their rights to due process of law, to the equal protection of the law, and to be free from cruel and unusual punishment.

The court does not find it either necessary or appropriate to pass upon all these ably presented challenges to the legality of petitioners' custody. For reasons discussed more fully infra, the court holds that the life sentences imposed upon Ms. Carmona and Ms. Fowler are so disproportionately severe in relation to the gravity of their offenses as to violate the Eighth and Fourteenth Amendments. The challenges to the lifetime parole provisions have obviously been rendered moot by the new legislation making these petitioners eligible for discharge from parole like any other parolees. Since the challenge to the preclusion of bail pending appeal was apparently not before the New York Court of Appeals in the Broadie case, and since there apparently yet remained an avenue to challenge that statutory provision in the New York courts, the court has already ruled that, in Ms. Foggie's case, the validity of that provision was not ripe for adjudication in the federal courts. United States ex rel. Carmona v. Ward, 416

F.Supp. 272 (S.D.N.Y. 1976). Since there are now no pending state appeals by these petitioners, it would appear that none of them have standing to challenge that provision.

The remaining provisions concerning plea bargaining and probation are discussed in the context of Ms. Foggie's case. As indicated infra, the court does not consider that either of these provisions offend the constitution, either considered singly or in conjunction with the others. Thus, Ms. Foggie's conviction and sentence should not be disturbed.

THE EIGHTH AMENDMENT CLAIM

It is, at this point in our constitutional jurisprudence, a truism to note that the power to define crimes and to establish punishments therefor rests with the legislature in the first instance. Pennsylvania v. Ashe, 302 U. S. 51, 55 (1937); Weems v. United States, 217 U. S. 349, 379 (1910). However, the exercise of that power is subject to judicial scrutiny to ensure that it does not transgress any constitutional prohibitions. The final judgment as to whether the punishment it decrees exceeds constitutional limits is a function reserved to the judiciary. Furman, supra, at 269 (Brennan J., concurring); Trop v. Dulles, 356 U. S. 86, 103-4 (1958) (plurality opinion of Warren, C.J.). The task of the courts is not, of course, merely to pass judgment upon the wisdom of

penal legislation, but rather to determine whether, upon accepted principles, it offends constitutional commands. Trop, supra, at 103.

The Cruel and Unusual Punishments Clause of the Eighth Amendment,^{25/} however, infrequently invoked by the Supreme Court, has served as an important-and controversial-check upon the legislature's power to define and punish crimes. In appropriate cases, the Supreme Court has not hesitated to rely upon that clause in declaring the imposition of a particular punishment constitutionally impermissible. See, e.g., Coker v. Georgia, 45 U.S.L.W. 4961 (June 29, 1977); Furman, supra; Robinson v. California, 370 U.S. 660 (1962); Trop, supra; Weems, supra. Nor, of course, has the United States Supreme Court been alone in relying upon that clause, or comparable provisions in state constitutions, to protect the right of individual defendants to be free of unduly harsh, oppressive, or arbitrary punishments decreed by a majoritarian political system. See, e.g., Hart v. Cooner, 483 F.2d 136, 140 (4th Cir. 1973), cert. denied, 415 U. S. 983 (1974); Ralph v. Warden, 438 F.2d 786 (4th Cir. 1970), cert. denied, 408 U.S. 942 (1972); In Re Foss, 519 P.2d 1073 (Cal. 1974); In Re Lynch, 503 P.2d 921 (Cal. 1972); Workman v. Commonwealth, 429 S.W.2d 374, 377 (Ky. 1968) and cases cited therein.

It is, furthermore, clear that a punishment may be constitutionally impermissible under the Eighth Amendment not only because of its nature or mode, but also because of its severity or harshness. A punishment, otherwise appropriate, may be so disproportionate to the offense charged and the circumstances of the case that it may violate the Constitution. "To be sure, imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual. But the question cannot be considered in the abstract. Even one day in prison would be cruel and unusual punishment for the 'crime' of having a common cold." Robinson, supra, at 667. Accord, Ralph, supra, at 789-90 (citing cases); In Re Lynch, supra, at 927 et seq. (citing cases). While the United States Supreme Court has never held a sentence of imprisonment invalid under the Eighth Amendment solely because of its length,²⁶ Downey v. Perini, 518 F.2d 1288, 1290 (6th Cir.) vacated and remanded, 423 U.S. 993 (1975), state courts and other federal courts have not been so reluctant. See Ralph, supra; Hart, supra; United States v. McKinney, 427 F.2d 449, 455 (6th Cir. 1970); cert. denied, 402 U.S. 982 (1971); In Re Lynch, supra. And there is obviously nothing in the Eighth Amendment standard enunciated by the Supreme Court which in terms, prevents their application to periods of imprisonment alone.

Application of either the concept of disproportionality or the more nebulous Eighth Amendment test of whether a challenged punishment comports with the "dignity of man", "[t]he basic concept underlying the Eighth Amendment" Trop, supra, at 100, obviously presents difficulties of interpretation upon which reasonable persons can and do differ. However, recent cases in the Supreme Court have provided sufficient guidance that this court's decision is somewhat facilitated.

Clearly, the application of such general and value-laden principles calls for the utmost in judicial self-restraint consistent with the conscientious discharge of the court's constitutional responsibilities. While the Eighth Amendment is an evolving concept "draw[ing] its meaning from the evolving standards of decency that mark the progress of a maturing society", Trop, supra, at 101, the Supreme Court has made clear that the process of divining such contemporary standards does not give federal judges license to apply to challenged punishments their own subjective perceptions of proper penology. Furman, supra, at 277-8, n.21 (Brennan, J., concurring). Insofar as possible, the constitutional propriety of a challenged punishment is to be judged by "objective indicia" rather than by subjective judicial reaction. Gregg v. Georgia, ___ U. S. ___, 49 L.Ed.2d 859, 874 (1976) (opinion of Stewart, J.); Coker, supra, at 4963.

The Court's recent decision in Coker reaffirmed its previous holding in Gregg that "a punishment is 'excessive' and unconstitutional if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime. A punishment might fail the test on either ground." 45 U.S.L.W. at 4963. In the instant case, this court holds that the punishments inflicted upon petitioners Carmona and Fowler are unconstitutional on the latter ground. 28/

The court considers first the punishments of imprisonment imposed upon Ms. Carmona and Ms. Fowler, who are incarcerated for indeterminate terms of six years to life and four years to life, respectively. Although it is entirely possible, and indeed probable, that they will both be released from prison substantially before the expiration of their maximum term they have no right to release at an earlier time, Menechino v. Oswald, 430 F.2d 403, 408 (2d Cir. 1970), cert. denied, 400 U.S. 1023 (1971), and their release is within the Parole Board's discretion. Accordingly, for Eighth Amendment purposes, the court must judge the severity of their punishments by looking to the maximum term possible under the judgment of the sentencing court — in this case, life imprisonment. Broadie, supra, at 475; In Re Lynch, supra, at 924-6. 29/

Thus, the precise question before the court is whether the State of New York may constitutionally punish either the sale of one individual dose of cocaine (in Mrs. Fowler's case) or possession of 3 and 3/8 ounces of cocaine (in Ms. Carmona's case) by life imprisonment.

The principal of proportionality of punishment to the offense is well settled under the Eighth Amendment. Weems, supra. And there are several objective indicia to which the court may turn in determining whether the punishment provided by the Legislature is so grossly disproportionate to the nature of the offense as to offend contemporary standards of decency.

Although by no means dispositive of a punishment's constitutionality, Gregg, supra, at 875, n.19, the enactments of legislative bodies, both in New York and elsewhere, serve as some index of community standards and values.^{30/} Coker, supra, at 4963-4; In Re Lynch, supra, at 935 et seq.; Ralph, supra, at 790-2; Hart, supra, at 139. Thus, they give some indication of a punishment's general moral acceptability.

In New York, all class A non-capital felony offenders must receive an indeterminate sentence with a maximum duration of life imprisonment.^{31/} Thus, class A drug offenders, irrespective of the degree of their involvement in the drug trade, receive the same maximum sentence as those felons convicted of first degree murder,^{32/} first degree arson,^{33/} and

kidnapping in the first degree.^{34/} Additionally, class A drug offenders are punished more severely than felons convicted of such crimes as second degree arson,^{35/} first degree rape,^{36/} first degree manslaughter,^{37/} first degree burglary,^{38/} and second degree kidnapping,^{39/} all of which are classified as B felonies carrying a maximum term of imprisonment of ^{40/}25 years. However, even this comparative picture of the treatment of class A drug offenders fails to convey the relative severity of the treatment which ^{is} accorded them, for all other class A offenders may plead guilty to a B felony or less, and thus avoid the mandatory maximum life term; only class A drug offenders were statutorily precluded from this treatment until recent amendments made such a plea possible for A-III offenders.^{41/} Moreover, only the class A drug felon was to remain, until recently, on parole for the rest of his or her life if ever released from prison.^{42/}

Not only is the treatment of A felony drug offenders unique in its severity among non-capital crimes in New York, however, but it is also virtually unique among all the States of the Union. The New York Court of Appeals duly noted in the Broadie case that "drug trafficking is punished more severely in this State than in other jurisdictions." 371 N.Y.S.2d at 480. By comparison, in apparently no other state would these petitioners, for these offenses, today be subjected to mandatory life sentences, with limited provisions for plea bargaining, and no possibility of discharge from eventual parole, if any.

At the time of the institution of this action, only two states -- California and Louisiana -- required the court to impose a life sentence for certain drug offenses. However, effective July 1, 1977, California eliminated the mandatory indeterminate life sentence and substituted definite sentences of up to five years for a first offender, depending on the nature of the offense.^{43/} The penalty for sale of any amount of cocaine, the more serious offense in the instant case, would today be punished by a definite sentence of from three to five years,^{44/} rather than five years to life as under previous law. Possession with intent to sell is now punished by imprisonment for two, three, or four years.^{45/} However, even prior to these changes, the California sentencing scheme was significantly different from New York's. In California, the "life sentence" was imposed as part of that state's indeterminate sentencing program, which accords to the Adult Authority responsibility for setting the actual term; the "life sentence" must be reviewed by the Adult Authority promptly after commitment, and a definite term of years set. In Re Rodriguez, 537 P.2d 384 (Cal. 1975). Furthermore, California also previously permitted probation for some narcotic offenders under certain circumstances.^{46/}

Louisiana still retains a mandatory life sentence^{47/} for certain narcotic offenses; for instance, sale of heroin. However, the penalty for sale (or possession with intent to sell

of cocaine is a sentence of from five years to thirty years at hard labor, and a fine of up to \$15,000.^{48/} Simple possession, moreover, is punishable by imprisonment, with or without hard labor, for not more than five years^{49/} and, if the defendant is a first offender, he may be eligible for a conditional discharge.^{50/} While this punishment scheme is in some respects severe, particularly with its provision for doubling of punishments for second or subsequent offenders,^{51/} it is still clear that both Ms. Carmona and Ms. Fowler would have received substantially less onerous sentences in either California or Louisiana under present law.

Under federal law, sale or possession with intent to sell cocaine (or, for that matter, heroin and many other narcotic drugs) is punishable as a first offense by probation or imprisonment up to 15 years, a fine of up to \$25,000, or both, along with a mandatory special parole term of at least three years^{52/} following any term of imprisonment. A second offense may be punished by imprisonment up to 30 years, a fine of up to \$50,000, and a special parole term of at least six years.^{53/} Ms. Fowler would have been subject to the former provision under federal law and she might well have received a sentence of probation. Ms. Carmona, who was charged with simple possession of cocaine,^{54/} could have received no more than one year imprisonment and/or a \$5,000 fine under federal law since this was her first conviction for a drug offense.^{55/} Even if it were a second

offense, she could have received no more than two years' imprisonment along with a possible \$10,000^{56/} fine. Moreover, as a first offender, she might have received probation, with a subsequent discharge from supervision and dismissal of the charges without an adjudication of guilt.^{57/} Even if either petitioner were adjudged to be a "dangerous special drug offender," she could receive a maximum of only 25 years' imprisonment.^{58/} Only if she were found guilty of engaging in a "continuing criminal enterprise" in concert with at least five others could she receive a term of imprisonment approaching a life sentence.^{59/}

Even this brief survey is sufficient to make it clear that the penalty imposed upon petitioners Carmona and Fowler is "unusual" in its severity, both when compared with punishments for other offenses within New York, and also when matched against punishments for similar offenses in other jurisdictions. This disparity is powerful evidence that the challenged punishments of life imprisonment do not comport with prevalent moral notions of what constitute just, temperate and appropriate punishments for these offenses. Thus, this evidence weighs heavily in the scales against the constitutionality of these sentences.

In response to this showing, however, the State makes two arguments.

First, it points out that, within a very broad range of discretion, it is the Legislature's prerogative to determine the relative gravity of offenses within its jurisdiction and to tailor its punishments accordingly. Pennsylvania v. Ashe, supra, at 55. The fact, therefore, that it chooses to penalize certain drug offenses more seriously than other crimes reflects a perfectly legitimate exercise of its constitutional powers.

Secondly, and somewhat more persuasively, it argues that the disparity in treatment of similar offenses between states is perfectly permissible in a federal union in which many jurisdictions are grappling with a narcotics problem of varying degrees of intractability. The State urges that the Eighth Amendment should not be applied in such a way as to discourage innovative solutions to a social and criminal problem which has, to a large degree, defied many disparate corrective approaches.

The State's first argument is certainly sound as a general principle, but it proves too much. Although the State clearly has a great deal of latitude in making judgments as to the relative severity of crimes, surely, to use an extreme example, the State would not be free, without any constitutional sanction, to provide a sentence of life imprisonment for a five dollar theft, when it made manslaughter, arson and rape punishable only by a maximum of twenty five years in prison. The judiciary must necessarily have some function in assuring that

the chosen punishment scheme comports with the human dignity of the criminals who are subject to it.

The State's second argument is, at least up to a point, very appealing. There is, surely, room in a federal system for a diversity of penological approaches to a problem as widespread and difficult as that of the illegal drug trade. Cf. Marshall v. United States, 414 U. S. 417, 427 (1974) (narcotic addict rehabilitation); McGinnis v. Royster, 410 U. S. 263, 270 (1973) (parole eligibility). Moreover, the concededly vast extent of the drug problem in the State and especially the City of New York has been widely noted,^{60/} and was certainly paramount in the minds of the concerned legislators who enacted the 1973 drug law in New York.^{61/} And the State clearly has "broad power" to regulate the narcotic drug traffic within its borders. Robinson, supra, at 664.

However, there necessarily remains a constitutional limitation upon the State's freedom to undertake even the most enlightened and well motivated approach to the most intractable and corrosive social problems. Whether the Legislature saw fit to hospitalize drug offenders indefinitely to attempt to effect their rehabilitation, or whether it decided to decree their summary execution as the ultimate deterrent, the courts could necessarily be called upon to determine whether such punishments comported with the dictates of the Eighth Amendment. "Judicial enforcement of the [Cruel and Unusual Punishments]

Clause. . . cannot be evaded by invoking the obvious truth that legislatures have the power to prescribe punishments for crimes. That is precisely the reason the Clause appears in the Bill of Rights." Furman, supra, at 269 (Brennan, J. concurring).

The State argues, as the New York Court of Appeals noted in Broadie, supra, at 477; 480, that narcotic offenses are peculiarly serious crimes in that they not only can lead to serious physiological damage and psychological dependency in the drug user, but they also can generate "collateral" crimes, often violent ones, as addicts are forced to resort to other crimes to support their habits. Therefore, it is argued, the Legislature was justified in imposing severe penalties on all those who play any "roles in the scourge of drug distribution", however peripheral. Broadie, supra, at 478.

There are at least two serious problems with this line of reasoning, however. In the first place, it is necessary to judge the proportionality of a punishment with relation to the actual offense committed; a penalty cannot be justified solely by the potential for more serious conduct, even though it may be violent and dangerous. For instance, in Ralph, supra, the Court of Appeals for the Fourth Circuit invalidated imposition of the death penalty for rape on the ground that, in that case, the rapist had "neither taken nor endangered life (438 F.2d at 788) despite the fact that the circumstances of

that case clearly involved the potential for such violence. Similarly, when the United States Supreme Court subsequently ruled that the death penalty for rape of an adult woman was impermissibly disproportionate to the gravity of the offense, it noted that "[a]lthough it may be accompanied by another crime, rape by definition does not include the death or even the serious injury to another person. The murderer kills; the rapist, if no more than that, does not." Coker, supra, at 4965 (footnote omitted). Clearly there are constitutional limits to the extent to which the statistical, or assumed, connection between a particular offense and collateral crimes may be used to justify a particularly harsh penalty for commission of the acts in question.^{62/}

Moreover, the Eighth Amendment requires that a Legislature make some rational gradations of culpability in determining the punishments mandated for criminal offenses. Ralph supra, at 788; In Re Foss, 519 P.2d 1073, 1079 (Cal. 1974). Cf. N.Y. Penal Law § 1.05(4). In the latter case, the California Supreme Court, interpreting the California constitution, ruled that a statutory provision absolutely precluding parole consideration during the first ten years of a mandatory ten years to life imprisonment sentence was, as applied to the defendant in that case, constitutionally invalid because disproportionate to the offense committed, even though the defendant was convicted of five counts of furnishing heroin and had previously been convicted of heroin possession. In so ruling, the Court

noted that "[w]e have no doubt that heroin abuse presents a serious problem to our society or that harsh penalties may be necessary to restrict the supply, sale and distribution of this substance. . . [H]owever, consideration should be given to the particular circumstances of the offenses committed such as the quantity of narcotics involved, and whether the transactions were those of an addict to support his habit. . . or were sales for profit made by other suppliers of heroin." 519 P.2d at 1079.

To say that the Legislature must make some rational gradations of culpability is by no means to say that, in every instance, mandatory prison sentences are unconstitutional, for that is clearly not the law. See, e.g., Gallego v. United States, 276 F.2d 914 (9th Cir. 1960) (five years minimum for importation of marijuana); United States v. Chow, 398 F.2d 596 (2d Cir. 1968) (five year minimum for importation of 15 pounds of opium). However, the punishments provided by the State of New York for class A felony drug offenders are quite extraordinary in their failure to differentiate between minor offenders and major drug dealers. It is certainly true that different mandatory minimum terms of imprisonment are provided for A-I, A-II, and A-III offenders, depending principally upon the aggregate amount of narcotic (or substance containing narcotic) involved in the particular offense.^{63/} However, each A felony offender, regardless of the gravity of his or her

offense, is nonetheless subject to a maximum term of life imprisonment which, as indicated ^{64/}supra, is the punishment to be considered in an Eighth Amendment analysis. Thus, for example, a person, never before involved with the law, who is convicted of agreeing to give ^{65/}any amount (up to one-eighth of an ounce) of a narcotic drug to a friend receives the same life sentence as does the major purveyor of heroin. This total failure to tailor the maximum indeterminate sentence in any meaningful way to the culpability of the offender, the gravity of the offense, and the peculiar circumstances of each case also renders the life sentences imposed in this case constitutionally suspect. ^{66/}

It is further argued by the State that the drug law's gradation of minimum terms of imprisonment according to the amount of the substance containing narcotic provides a constitutionally sufficient method of differentiating among various degrees of culpability within the general class of A felony drug offenders. In a case involving a challenge to the predecessor New York statutes, the Court of Appeals for this Circuit upheld use of the aggregate weight standard to define different crimes, noting that "[t]he State cannot be expected to make gradations and differentiations and draw distinctions and degrees so fine as to treat all law violators with the precision of a computer. . . ." United States ex rel. Daneff v. Henderson ^{67/}501 F.2d 1180, 1184 (2d Cir. 1974). However, that case, and

the difference between minimum terms generally, are simply not relevant to the Eighth Amendment issue for decision. The petitioners are not challenging the concept of the mandatory ^{68/} minimums, per se, but rather the maximum life sentences, which are mandatory for all class A felony offenders, and which form the relevant benchmark for Eighth Amendment purposes. And it is unquestioned that that term is applied to all A felony drug offenders, regardless of the amount of narcotic substance involved in their particular cases.

It should be further noted that whatever rationality is imparted to the A felony drug punishment scheme by the differentiation based upon the amount of narcotic-containing substance involved has been substantially vitiated by the operation of the law in practice. And, as Justice Douglas noted in his concurring opinion in Furman, supra, "[w]hat may be said of the validity of a law on the books and what may be done with the law in its application do, or may, lead to quite different conclusions." 408 U. S. at 242. ^{69/} The proscription against pleading out of the A felony class, until recently changed by amendment, led to the result that many drug offenders originally charged with A-I and A-II drug offenses were allowed to plead guilty to A-III charges, ^{70/} while those charged with A-III offenses were not allowed to plead to reduced charges. ^{71/} Thus, those persons accused of what were, at least theoretically, the least serious offenses in the A felony

category were facing precisely the same penalties as many of those accused of the most serious, i.e., A-I offenses. Moreover, evidence presented to the court indicated that those persons originally charged with A-I and A-II offenses were not receiving sentences any more severe, in terms of the minimums provided, than those who were originally charged with A-III offenses; most received the minimum sentence of one year to life imprisonment.^{72/} Restrictions on probation further ensured that the category of persons sentenced as A-III felons would encompass not only many serious offenders, but also individuals who might have been under other circumstances, treated as inconsequential offenders and released on probation.

To point out these anomalies is by no means to suggest that criminal defendants have a "right" to plead guilty to charges less serious than those which they originally faced. They clearly have no such right. See Hutcherson v. United States, 345 F.2d 964, 967 (D.C. Cir.), cert. denied, 382 U. S. 894 (1965) ("A defendant has no constitutional right to elect which of two applicable statutes shall be the basis of his indictment and prosecution."). Moreover, petitioners' argument that reducing the discretion of the sentencing judge merely leaves undue discretion in the hands of police making arrests and prosecutors deciding whether to prosecute and on what charges is not pertinent to the Eighth Amendment claim. Proffitt v. Florida, ___ U. S. ___, 49 L.Ed.2d 913, 924 (1976); Gregg, supra, at 889.

The point is the somewhat collateral one that, to the extent that the State argues that the differentiation in minimum terms of imprisonment takes constitutionally sufficient cognizance of the different gradations of culpability among class A felony drug offenders, that argument is seriously undercut by the way in which the law has operated in practice. In a criminal justice system which is simply not equipped to try all cases as originally charged, the statutory differences among offenses may turn out to be virtually meaningless in practice. However, as indicated previously, the State's provision for different minimum sentences for various categories of A felonies does not cure the fact that all class A drug offenders, regardless of the gravity of their offenses, receive a mandatory maximum sentence of life imprisonment.

To summarize, the court holds that the mandatory sentences of life imprisonment imposed upon Ms. Carmona and Ms. Fowler are so grossly disproportionate to the nature of their offenses as to constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution. These sentences are significantly more severe than those which would have been imposed for the same offenses in any other jurisdiction in the United States, and are more severe than those imposed for many serious and violent crimes in the State of New York itself. The statutory scheme pursuant to which they were imposed does not differentia

in imposition of this maximum punishment, among offenders of varying degrees of culpability, nor does it allow for consideration of any mitigating circumstances in the case unless the accused persons can provide the prosecutors with sufficient new and material intelligence information that they become eligible for a probation recommendation. Even in view of the admitted severity of the drug abuse problem in New York, this court cannot accept the proposition that the State's legitimate interests in both deterrence and isolation of drug offenders could not be as well served by such sentences of shorter duration as are provided for in other jurisdictions in this nation,^{73/} including the federal system where many New York City and State drug offenders are regularly tried, convicted, and sentenced.

Finally, as noted by the Court of Appeals for the Fourth Circuit in Hart, supra, "Life imprisonment is the penultimate punishment. Tradition, custom, and common sense reserve it for those violent persons who are dangerous to others. It is not a practical solution to petty crime in America. Aside from the proportionality principle, there aren't enough prisons in America to hold all the Harts that afflict us." 483 F.2d at 141. This court does not mean to suggest, of course, that the offenses for which Ms. Carmona and Ms. Fowler were convicted should be characterized as "petty crimes". However, it is appropriate to note that these were

not crimes of violence, nor were the aggregate amounts of cocaine -- containing substance very large in any of the three cases before the court.^{74/} In light of the amounts of illicit substance involved in the cases of Ms. Carmona and Ms. Fowler, the court has the "abiding conviction"^{75/} that the life sentences imposed are so disproportionately severe as to be unconstitutional. It is certainly true that both these petitioners had either previous or contemporaneous involvement with the criminal justice system. But just as those charges did not warrant a more severe sentence as a second narcotic offender, they cannot serve to justify the Draconian penalty imposed for the instant offenses.

DONNA FOGGIE

As indicated previously, Ms. Foggie is currently on parole, having been released from prison after serving roughly one year of her one year to life sentence. Necessarily, her situation presents very different constitutional questions.

Much of the discussion concerning the Eighth Amendment validity of Ms. Carmona's and Ms. Fowler's sentences is simply inapplicable to Ms. Foggie. Although she too received the mandatory maximum sentence of life imprisonment, she was released shortly after serving her minimum term. Since it is patent that she will not be serving a life sentence, and

since, even if she were to be adjudicated a parole violator and returned to prison, she would nonetheless now be subject to later release and ultimate discharge from parole on the same basis as all other parolees, the court cannot hold that the punishment imposed upon her for the offense of selling \$40 worth of cocaine is so grossly disproportionate as to violate the Eighth Amendment. Nor, even taking into account all the evidence concerning the implementation of the law with whatever arguable inequities may be attendant thereto, can the court hold that this punishment — of one year's imprisonment and subsequent parole — violates the Eighth Amendment under the alternative criterion set forth in Coker. 45 U.S.L.W. at 4963.

However, as indicated previously, Ms. Foggie has challenged the constitutionality of her sentence under the Due Process and Equal Protection Clauses, as well as under the Eighth Amendment. While this argument obviously differs in some respects from the Eighth Amendment argument, it is predicated upon the same observations concerning the drug law and its application.

Briefly stated, the argument is that the challenged drug law irrationally and without legal justification singles out class A drug felons for especially harsh punishments, which are then imposed in an arbitrary manner bearing little, if any, relationship to the gravity of the offense involved.

As applied to Ms. Foggie, the court finds this argument to be without merit.

It is undisputed, in the first place, that the sale of a quantity of cocaine, however small, is an act which the State may properly make subject to its penal laws. See Robinson, supra, at 664. And there is no question in this case that Ms. Foggie did, indeed, commit the act for which she was convicted.

Since Ms. Foggie, at this point, clearly lacks standing to complain both of the indeterminate life sentence and also of the previously effective lifetime parole provision her challenge is necessarily restricted to those portions of the drug law which differ from the treatment of other offenders, specifically, the previously effective preclusion of plea bargaining for A-III felony offenders, and the predication of probation, in part, upon a recommendation from the prosecutor.^{76/}

In the court's view, the State of New York could preclude A-III felony offenders from pleading to reduced charges without offending the Equal Protection or Due Process Clauses of the Constitution. The clear purpose of that provision was to ensure that all those persons accused of class A drug felonies^{77/} would be subject to some mandatory sentence of imprisonment (with very limited possibility for probation), presumably both to isolate them from the rest of society for

some period of time, and to deter others from committing similar offenses. (Although those persons accused of A-I and A-II felonies are allowed to plead guilty to A-III felonies, they do not thereby escape some mandatory imprisonment.) Relatively speaking, of course, this provision was more onerous to those accused of A-III offenses than to those accused of A-I and A-II offenses; the A-III offender could not gain any benefit from pleading guilty. Moreover, this preclusion served to set apart class A drug offenders as a class from all other persons accused of felonies in New York.

However, in the court's view, this distinction bears a clearly rational relation to the Legislature's defensible goal of ensuring that relatively more serious drug offenders all receive a prison term as a deterrent to other crime.^{78/} It is certainly not to be discounted, of course, that the Legislature has since altered this provision to allow those accused of A-III offenses to plead guilty to as little as a 'C' felony, and that the Governor himself has termed the restriction "irrational".^{79/} However, the principal reason both for the Governor's remark and also for the Legislature's action appears to be that the restriction caused a considerable backlog of A-III cases for trial and diverted prosecutorial resources, at great expense, from prosecution of major violent crimes. Neither the Governor nor the Legislature thereby conceded that the restriction of plea bargaining did not serve some deterrent purpose. Moreover, the testimony in this court made clear that

at least one principal (and, from the State's point of view, desirable) side effect of this restriction was that more defendants were willing to cooperate in providing law enforcement officials with information concerning drug activities in the hope of obtaining a recommendation for probation, rather than facing the harsh penalties provided for class A drug felons. While the restriction on plea bargaining for A-III felons clearly contributed substantially to court congestion and delay and thereby increased the likelihood that A-I and A-II felons would plead to A-III charges, this court cannot say, from the evidence before it in this case, that the restriction on plea bargaining is so devoid of any substantial relation to any legitimate state purpose that it violates the Equal Protection Clause, even having due regard for the very substantial interests at stake on the part of the criminal defendants involved.

Much the same can be said of the provision restricting probation to those persons who, in the eyes of the prosecutor, are able to provide "material assistance" in the investigation or prosecution of drug offenses.^{80/} There exists no constitutional "right" to be placed on probation, rather than receive a sentence of imprisonment for a crime which the state may legitimately punish. And this court cannot find that it is unconstitutional for the State to extend this benefit only to those defendants who, in turn, are able and willing to extend a benefit to the State through cooperation. See Brady v. United

States, 397 U. S. 742, 753 (1970). Probation is, of course, not generally available to persons convicted of class A felonies,^{81/} and is made available to class A-III felons only on this conditional basis. The obvious purpose of this exception was "to get small fry drug dealers or addicts to cooperate in the apprehension and conviction of the bigger traffickers."^{82/} It is certainly possible that, in many instances, the persons initially accused of A-III crimes due to the small amounts of narcotic-containing substance involved may be unable to provide the information that more serious offenders might have available. And the anomalous result could be that those persons initially accused of dealings in larger amounts could be allowed to plead down to A-III offenses and then be granted probation in exchange for their greater store of marketable information. However, this court cannot hold that, on that basis alone, the statutory distinction drawn between class A-III felons and those other felons eligible for probation without condition is so unrelated to a rational state purpose, i.e., inducing cooperation by lesser drug offenders, that it violates the Equal Protection Clause. The fact that, in practice, the statute may operate in such a way as to allow certain more serious drug dealers to escape imprisonment does not render the provision irrational, nor does it wholly vitiate the purpose for which it was enacted.

In sum, the court finds no constitutional infirmity in Ms. Foggie's conviction or sentence.

RELIEF

Since the court has declared unconstitutional the maximum sentences imposed upon Ms. Carmona and Ms. Fowler, the State is directed to discharge them from incarceration at the expiration of their minimum terms of imprisonment unless new, and constitutionally appropriate, maximum sentences are imposed within 90 days of filing of this opinion.

Dated: New York, New York

August

CONSTANCE BAKER MOTLEY
U. S. D. J.

FOOTNOTES

1. The original petitioners were Martha Carmona and Donna Foggie, who instituted the action with the intention of having it certified as a class action. Before they moved for class certification, three other state prisoners sought to intervene in the case. Petitioners did not object to the intervention and, in fact, indicated that, if intervention were permitted, they would not press for class certification. (February 5, 1976 transcript at 29.) By opinion dated April 16, 1976 (416 F.Supp. 276), the court allowed Roberta Fowler to intervene, but denied Larry C. Mosley and Doris McNair such permission. The original petitioners did not thereafter press their request for class certification.
2. The relevant sections will be discussed more fully infra and are hereinafter collectively referred to as the "1973 drug law".
3. Penal Law § 220.18: "A person is guilty of criminal possession of a controlled substance in the second degree when he knowingly and unlawfully possesses: (1) one or more preparations, compounds, mixtures or substances of an aggregate weight of one ounce or more containing a narcotic drug. . . .

"Criminal possession of a controlled substance in the second degree is a class A-II felony."

Cocaine and heroin, among many others, are classified as "narcotic drugs." Penal Law § 220.00(7); Public Health Law § 3306.

FOOTNOTES, cont'd

4. Penal Law §§ 70.00(1), (2)(a), (3)(a)(ii).
5. Penal Law § 220.21: "A person is guilty of criminal possession of a controlled substance in the first degree when he knowingly and unlawfully possesses: (1) one or more preparations, compounds, mixtures or substances of an aggregate weight of two ounces or more containing a narcotic drug. . . .

"Criminal possession of a controlled substance in the first degree is a class A-I felony."
6. Penal Law §§ 70.00(1), (2)(a), (3)(a)(i).
7. Penal Law §§ 65.00(1)(b), (3)(a)(ii). Such a recommendation is only possible in the case of an A-III felony, so the District Attorney would first have to agree to a plea to a reduced charge of an A-III felony.
8. Until the law was amended during the pendency of this action (see note 22 *infra*), persons convicted of class A drug related offenses could never be discharged from parole. N.Y. Correction Law § 212(8). In this disability, they stood alone among those convicted of criminal offenses in New York.
9. Penal Law § 220.39: "A person is guilty of criminal sale of a controlled substance in the third degree when he knowingly and unlawfully sells: (1) a narcotic drug. . . .

"Criminal sale of a controlled substance in the third degree is a class A-III felony."

FOOTNOTES, cont'd

10. Penal Law §§ 70.00(1), (2)(a), (3)(a) (iii).
11. See note 9, supra.
12. In her original petition for a writ of habeas corpus, Ms. Fowler alleged in conclusory fashion several trial errors in addition to the constitutional claims advanced also by her co-petitioners. However, in view of the fact that she had adduced no evidence or legal argument whatsoever to substantiate those claims, they have apparently been abandoned.
13. On April 27, 1972, Ms. Fowler was arrested and charged with criminal possession of a hypodermic instrument (Penal Law § 220.45) and criminal use of drug paraphernalia in the second degree (Penal Law § 220.50). She was adjudged guilty of both charges and sentenced to three years probation. On June 29, 1972, she was arrested and charged with prostitution (Penal Law § 230.00). She was found guilty on August 9, 1972, and was sentenced to one year's probation. On February 22, 1973, she was again arrested, charged with prostitution, and found guilty on July 30, 1973. On July 10, 1973, she was arrested and charged with obstructing government administration (Penal Law § 195.05), possession of a dangerous drug (Penal Law § 220.05) [now repealed], and possession of stolen property (Penal Law § 165.45). These charges were dismissed because she pleaded guilty to another charge on July 30, 1973. On July 12, 1973, she was arrested and charged with petit larceny (Penal Law § 155.25), criminal possession of stolen property in the third degree (Penal Law § 165.40).

FOOTNOTES, cont'd

and possession of a forged instrument in the second degree (Penal Law § 170.25). On July 30, 1973, she was convicted of petit larceny and conditionally discharged on three years probation.

14. Cf. People v. Jones, 385 N.Y.S.2d 525, 527-9 (N.Y. 1976) (Breitel, C.J., dissenting).
15. It is worthy of note that the memorandum opinion of the Appellate Division, Second Department affirming Ms. Foggie's conviction noted that "[h]er contention that the sentencing provisions of the narcotics statutes are unconstitutional as applied to her is without merit," citing Broadie. New York Law Journal, June 3, 1977, page 7, column 3.
16. See transcript of February 5, 1976 hearing, at p. 7.
17. Petitioners' Reply Memorandum at pp. 12-13.
18. See also Rowe v. Peyton, 383 F.2d 709, 711-12 (4th Cir. 1967), aff'd, 391 U.S. 54 (1968).
19. Penal Law § 70.00.
20. Criminal Procedure Law § 220.10(5)(b) now, effective July 1, 1976, permits a defendant accused of an A-III felony, or an attempt to commit such a felony, to plead guilty to

a lesser offense, down to a class C felony. Section 220.10(6) had previously prevented those accused of A-III felonies from pleading guilty to a reduced charge.

21. Correction Law §§ 212(6) and (8).
22. The Governor's bill, S.6912, has been passed by both Houses of the New York Legislature. It was placed on the Governor's desk for his signature on August 2, 1977. This opinion is written on the assumption that the Governor will sign the bill.
23. Penal Law § 65.00(1)(b).
24. Criminal Procedure Law § 530.50.
25. The Cruel and Unusual Punishments Clause of the Eighth Amendment is fully applicable to the States through the Due Process Clause of the Fourteenth Amendment. Furman, supra, at 257 n.1; Robinson v. California, 370 U.S. 660 (1962).
26. The Supreme Court did entertain and reject such a challenge as early as Howard v. Fleming, 191 U. S. 126 (1903), however.
27. It bears noting that, in eschewing reliance on subjective perceptions by the judiciary, the Supreme Court has enunciated a standard which, at least in emphasis, seems to impose somewhat more judicial restraint than formulations set forth in the construction of some comparable state constitutional provisions. See e.g., In Re Lynch, supra, at 930 ("shocks the conscience"); Workman, supra, at 378 ("shocks the general conscient").

FOOTNOTES, cont'd

28.

While the court holds that the punishment of life imprisonment imposed upon Ms. Carmona and Ms. Fowler are invalid on the ground of disproportionality, the court was also presented with considerable evidence bearing on the alternative test, *i.e.*, whether the drug law makes any "measurable contribution to acceptable goals of punishment". Although the court does not rest its holding on this ground, it is worth noting that, insofar as it is possible to gauge the "success" of a penal law, the 1973 drug law's record has been mixed at best.

The State does not argue that, by any reading of these statutes, they were intended to rehabilitate drug offenders. Indeed, the New York Court of Appeals found that the purposes of these enactments were isolation and deterrence of drug offenders. *Broadie, supra*, at 478. While retribution is not a constitutionally impermissible goal of penal legislation, *Gregg, supra*, at 880, it is not the objective of the laws at issue in this case, nor, arguably, is it a goal of any penal legislation in New York. See N.Y. Penal Law § 1.05(5). Thus, the effectiveness of this legislation should be judged in relation to the goals for which it was enacted.

While it is virtually impossible to gauge with any precision the deterrent effectiveness of a given penal sanction, there are reasons to question whether the 1973 drug laws have proved to be an effective deterrent to drug-related offenses.

In the first place, at least through the end of 1975 (and prior to relaxation of the restrictions on plea bargaining by A-III offenders) the speed with which cases are processed did not

FOOTNOTES, cont'd

improve, and whatever correlation exists between speed of punishment and deterrence of crime was not realized. As discussed infra, the fact that persons accused of A-III offenses could not plead guilty to any less serious crimes led to a substantial increase in the demand for trials of A-III indictments, since A-III offenders stood to "lose" nothing by taking their chances before a jury. This increase in trials caused a backlog of untried cases, particularly in New York City, and increased the time required to obtain dispositions of drug charges. Additionally, this backlog of A-III cases to be tried increased the pressure on prosecutors to allow arguably more serious offenders, i.e., those accused of A-I and A-II drug offenses, to plead guilty to A-III charges, with their lower minimum sentences. Indeed, it was pressure from state prosecutors which, at least in part, led to the 1976 amendments permitting those charged with A-III offenses to plead guilty to lesser offenses, thereby relieving the logjam.

Secondly, at least in the admittedly "transitional" period of 1973 through 1975, there is some evidence that the number of drug offenders sentenced to prison in New York actually declined. In 1975, both the number of dispositions and also the number of prison sentences imposed for all drug offenses in New York State (not just class A felonies) were less than the comparable figures for 1973. This anomaly was due primarily to the backlogs in the New York City courts occasioned by the increasing number of defendants who were choosing to go to trial. However, the figures for 1975 were higher than the figures for 1974. Moreover, the percentage of those convicted who actually received prison sentences increased substantially, from 32.9% in 1973 to 46.3% in 1975. (The figures are as low as they are for two reasons: they include some drug crimes, other than class A felonies, which do

FOOTNOTES, cont'd

not carry mandatory prison sentences; and they include some other cases, brought under the less severe predecessor statutes, which do not carry mandatory sentences.) Finally, the percentage of those first offenders accused of class A felonies who received prison sentences increased from about 10% to about 90%. (Prior to the 1976 amendments, persons indicted for class A drug felonies could escape the mandatory lifetime sentences only by being acquitted, by being adjudicated youthful offenders, or by qualifying for a prosecutor's recommendation of lifetime probation in exchange for cooperation.)

There was also evidence in this case that the prospect of mandatory life sentences and mandatory minimum terms had substantially increased the willingness of indicted drug dealers to cooperate with both federal and state authorities. There is, however, no necessary correlation between the willingness of defendants, already charged, to cooperate with the authorities, and the perceptions of drug users or dealers still undetected and at liberty.

In sum, while the speed of dispositions decrease and the absolute number of dispositions and sentences also decreased (at least temporarily) the risk of receiving a prison sentence after conviction increased substantially under the 197 drug law. This court obviously cannot and need not determine whether these phenomena will substantially increase the deterrent effect of New York's drug laws.

29.

Cf. Trop, supra, at 102: "It is no answer to suggest that all the disastrous consequences of this fate may not be brought to bear on a stateless person. The threat makes the punishment obnoxious."

FOOTNOTES, cont'd

30. The rationale for comparing the challenged punishment with punishments for other types of crimes in the same jurisdiction has been stated as follows: "[T]he Legislature may be depended upon to act with due and deliberate regard for constitutional restraints in prescribing the vast majority of punishments set forth in our statutes. The latter may therefore be deemed illustrative of constitutionally permissible degrees of severity and if among them are found more serious crimes punished less severely than the offense in question, the challenged penalty is to that extent suspect." In Re Lynch, supra, at 932.

The rationale for comparing the punishment in question with punishments for the same crime in other jurisdictions is based upon "the assumption...that the vast majority of those jurisdictions will have prescribed punishments for this offense that are within the constitutional limit of severity; and if the challenged penalty is found to exceed the punishments decreed for the offense in a significant number of those jurisdictions, the disparity is a further measure of its excessiveness." In Re Lynch, supra, at 932. See also Weems, supra, at 377; Trop, supra, at 102.

31. Penal Law § 70.00.
32. Penal Law § 125.27.
33. Penal Law § 150.20
34. Penal Law § 135.25.
35. Penal Law § 150.15.

FOOTNOTES, cont'd

36. Penal Law § 130.35.
37. Penal Law § 125.20.
38. Penal Law § 140.30.
39. Penal Law § 135.20.
40. Penal Law § 70.00(2)(b).
41. Criminal Procedure Law § 220.10. A-I and A-II offenders must still plead to at least an A-III offense.
42. See notes 8 and 22, supra.
43. Cal. Health and Safety Code §§ 1135, et seq.
44. Cal. Health and Safety Code § 11352.
45. Cal. Health and Safety Code § 11351.
46. Cal. Penal Code §§ 1203, 1203.07.
47. L.S.A. § 40:966.
48. L.S.A. § 40:967.

FOOTNOTES, cont'd

49. L.S.A. § 40:967.
50. L.S.A. § 40:983.
51. L.S.A. § 40:982.
52. 21 U.S.C. § 841 (b) (1) (A).
53. 21 U.S.C. § 841 (b) (1) (A).
54. The New York Penal Law does not distinguish between possession with intent to sell and simple possession. Ms. Carmona was convicted simply of criminal possession of a controlled substance. Her statement to the District Attorney, however, made clear that she possessed the cocaine with intent to sell it. Therefore, she would probably have been so charged under those circumstances under federal law.
55. 21 U.S.C. § 844(a).
56. 21 U.S.C. § 844(a).
57. 21 U.S.C. § 844(b).
58. 21 U.S.C. § 849.

FOOTNOTES, cont'd

59. 21 U.S.C. § 848.
60. See, e.g., Broadie, supra, at 480.
61. See, e.g., the legislative history cited in Broadie, supra, at 481; see also 2 McKinney's 1976 Session Laws of New York, 2317-2322 (Governor's Message).
62. It is interesting to note that a widely assumed correlation between the incidence of robberies and assaults and the geographically concentrated practice of prostitution has led, in the main, to calls for stricter enforcement of existing laws against prostitution, rather than for an increase in the penalties for that offense, which is presently a class B misdemeanor. Penal Law § 230.00.
63. A convicted felon may well not be released from prison at the expiration of the minimum term imposed by the court, however, since the Parole Board retains considerable discretion concerning the actual timing of the release date. Observation has tended to indicate that prisoners usually serve more than the minimum term. (Transcript of November 10, 1976 hearing at 147).
64. See p. 21, supra.
65. See note 9, supra. "'Sell' means to sell, exchange, give or dispose of to another, or to offer or agree to do the same." Penal Law § 220.00(1).

FOOTNOTES, cont'd

66. It is true, of course, that portions of the 1973 drug law do differentiate between first offenders and repeat offenders. See, e.g., Penal Law §§ 220.12; 220.34(2); 220.37(2); 220.39(2); 220.55. However, those provisions do nothing to distinguish among class A offenders in terms of imposition of the maximum penalty of life imprisonment.
67. That case explicitly declined to pass judgment on the aggregate weight standard in the context of the 1973 drug law, however. 501 F.2d at 1185, n.6.
68. See transcript of November 9, 1976 hearing, at pp. 2-3.
69. Cf. Furman, supra, at 314 (White, J., concurring): "Legislative 'policy' is thus necessarily defined not by what is legislatively authorized but by what juries and judges do in exercising the discretion so regularly conferred upon them."
70. The court heard testimony from Anthony F. Japha, Director of the Committee on New York Drug Law Evaluation of the Association of the Bar of the City of New York. As a part of that study, he determined that, in New York City, where a major portion of the State's drug offenses are tried, in 1974 and 1975 some 29% of cases which began as A-I indictments were ultimately disposed of as A-II charges, and 59% of A-I indictments were disposed of as A-III charges. Some 73% of A-II indictments

FOOTNOTES, cont'd

were ultimately disposed of as A-III charges. (November 9, 1976 transcript at 62).

It bears noting that, during those years, approximately 75% of the drug indictments in New York City were for class A felonies, with roughly 35% of those being A-I, 28% being A-II, and 36% being A-III. (Nov. 9 tr. at 61). Statewide, over 50% of all drug indictments were for class A felonies. However, 84% of all drug convictions in the state were for A-III felonies.

71.

That prosecutors would have, but for the law's restrictions, allowed a substantial number of persons accused of A-III felonies to plead guilty to lesser crimes is indicated by the testimony of Sterling Johnson, Jr., Special Narcotics Prosecutor for the City of New York. (November 10, 1976 transcript at 167). Had she been allowed to plead to a reduced charge, Ms. Foggie would have probably been allowed to plead to a class C felony. (Id. at 164-5).

72.

Paradoxically, in New York City during 1974 and 1975, A-I and A-II felons pleading guilty to A-III charges were slightly more likely to receive the minimum one year to life sentence than were defendants originally charged with A-III felonies.

FOOTNOTES, cont'd

73. Although this court "may not require the legislature to select the least severe penalty possible so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved", Gregg, supra, at 876, the fact that the challenged punishment appears substantially more severe than necessary to achieve the Legislature's avowed penal objectives is a factor that must be weighed in judging the sentence's propriety under the Eighth Amendment. Furman, supra, at 282 (Brennan, J., concurring); Gregg, supra, at 879 ("Although we cannot invalidate a category of penalties because we deem less severe penalties adequate to serve the ends of penology, the sanction imposed cannot be so totally without penological justification that it results in the gratuitous infliction of suffering.")
74. It is worth noting that the Report of the Temporary State Commission to Evaluate the Drug Laws, Legislative Document (1972) No. 10 indicated that it would be reasonable to make possession of one aggregate pound of illicit drug an A felony, noting specifically that possession of that amount of a narcotic drug "is indicative of major dealership."
75. Coker, supra, at 4965.
76. As noted previously, the court has already ruled that Ms. Foggie failed to exhaust her state remedies on the issue of preclusion of bail pending appeal.

FOOTNOTES, cont'd

77. Unless acquitted, recommended for probation, or adjudicated youthful offenders.
78. The court has ruled that, in the case of Ms. Carmona and Ms. Fowler, the life sentences are so disproportionately severe as to violate the Eighth Amendment. The court does not thereby hold, of course, that the life sentences provided for class A felons could never be applied in any case consistent with the strictures of the Eighth Amendment.
79. In his message of August 9, 1975 accompanying his veto of a bill eliminating the plea bargaining restriction on A-III felonies. The bill was disapproved because it also imposed across-the-board plea bargaining restrictions in all major non-drug felonies.
80. Penal Law § 65.00(1)(b).
81. Penal Law § 60.05(1).
82. Practice Commentary of Arnold Hechtman, McKinney's Cons. Laws of New York, Book 39, Penal Law § 65.00, p. 170.

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rgrp Cashel - direct

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are ever released from prison?

A Yes, sir.

Q Mr. Cashel, have you ever personally had the opportunity to observe persons who were subject to a sentence of lifetime parole?

A Yes, I have.

Q Would you please describe that experience.

A Being on parole after a given number of years, say after two, three or four years, might be described as being a state of being. It is a condition that exists, I would say it is akin to something like, maybe, having a scarlet letter or being surviving with the loss of a limb, if you want. It is a condition that is totally permeating. It is just a situation that exists.

Q How long are most parolees in New York supervised?

A Five years.

Q Is there any other group other than these drug offenders who are supervised for more than five years as a group?

A As a group, I know of none.

Q Mr. Cashel, upon being released from prison, are all parolees required to sign a certain contract which outlines in general form their obligations as a parolee?

2 A Yes, they are.

3 MR. MORRIL: Your Honor, we previously marked
4 these exhibits. I am showing Mr. Cashel Exhibit No. 9.

5 Q I would like to ask you, Mr. Cashel, if that
6 is a copy of the parole contract which is presently in use.

7 A Yes, it is.

8 MR. MORRIL: Your Honor, I would ask that that
9 be received in evidence.

10 THE COURT: Any objection?

11 MR. RYAN: No, your Honor, but I would like
12 to get a copy.

13 THE COURT: There being no objection, let it
14 be received.

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15 (Petitioner's Exhibit 9 received in Evidence.)

16 Q Mr. Cashel, I would like to direct your atten-
17 tion initially to Paragraph 3 of that contract, which I
18 believe reads in part: I will fully comply with the
19 instructions of my parole officer. I will make office
20 and/or written reports as I am directed.

21 Mr. Cashel, is every parolee in New York
22 State assigned to a parole officer?

23 A Yes, he is.

24 Q That would include persons who had been under
25 supervision for many years?

2 A Yes, sir.

3 Q There is no one who is not?

4 A That's right.

5 Q Mr. Cashel, would you describe what the re-
6 porting requirements are for parolees?

7 A In general terms, this is fairly much guided
8 by the amount of time he has been out of prison. There are
9 many exceptions, of course, but as a general guideline,
10 upon his release to parole supervision, he is placed on what
11 we call intensive supervision as regards the reporting
12 requirement.

13 A person on parole is required to report to
14 his parole officer weekly -- if you want to go into the other
15 aspects.

16 The parole officer's responsibility during
17 that initial period is to visit his home at least once a
18 month and see him there and visit his job once a month and
19 see him there.

20 This situation of intensive supervision
21 normally will last for a period of between three and six
22 months. All things being equal, if the condition is fairly
23 well stabilized, he would then be advanced to what we call
24 active supervision.

25 In that category, he would be required to

2 report to his parole officer once a month. The parole officer
3 must continue to visit his home monthly, but must only see
4 him there once every three months. The same way on his
5 employment, the parole officer must verify his employment
6 monthly, but only see him at his place of employment every
7 three months.

8 This situation, or what we call active super-
9 vision, would normally last for another two years. At
10 this point, again, all things being equal, and assuming
11 the situation is stable, he would be placed on what we call
12 reduced supervision, which would require him to report to
13 his parole officer quarterly and similarly the parole officers
14 would make visits at quarterly intervals.

15 Q Mr. Cashel, is there any administrative provision
16 for reporting less frequently than you have describe?

17 A There are administrative provisions with the
18 permission of an area supervisor who runs generally a
19 geographic entity in the city. It is possible for a
20 parolee to report once -- twice a year or even up to once
21 a year.

22 I know of parolees in that category at that
23 time, although the administrative provision is there.

24 Q Were parolees ever allowed to completely
25 lose contact with the department?

2 A No.

3 Q To just drift away?

4 A No.

5 Q Are there circumstances under which a long-
6 time parolee could have his supervision reinstituted on a
7 more frequent basis?

8 A Oh, yes. Actually it is optional with the
9 parole officer to whom the case is assigned.

10 The most frequent example would be loss of
11 employment through his own fault. This would frequently mean
12 return even to intensive supervision. Even if he had been
13 on parole for four or five years, he would be placed back on
14 intensive supervision.

15 Q Would something like family difficulties or
16 personal stress possibly lead to reinstitutionalization?

17 A That could be true.

18 Q Could that be true if the parolee had been
19 under parole supervision for perhaps 20 or 30 years?

20 A It's possible.

21 Q Mr. Cashel, can a parolee have his or her
22 parole revoked for violating that parole contract, no
23 matter how long he or she has been on parole?

24 A Definitely.

25 Q Did you observe in fact these persons who you

2 saw to be on lifetime parole to have their parole revoked
3 at times for violation of that contract?

4 A I must answer that in the affirmative, but if
5 you permit me, I must clarify that a little bit in that
6 normally if that does happen, there is a strong suspicion
7 which could not be proven that there was other activity
8 going on and delinquency might well have been taken strictly
9 for violating the rules of parole.

10 Q Are there actions which can be taken, short
11 of a formal violation proceeding, for violations, no
12 matter how minor, of the parole contract?

13 A The only sanctions would be the increase in
14 reporting schedule and possibly increased visitation by the
15 parole officer in a type of surveillance setup to see what
16 is going on.

17 The only other sanction at our command is
18 issuance of a warrant and arrest.

19 Q Does it ever happen that parole violations
20 are just ignored, no notice made of them, and the parole
21 officer essentially closes his eyes to them?

22 A It's possible, yes. If a person has been on
23 parole for a long time, we might not become too upset, for
24 example, if he stayed out all night, even though maybe the
25 requirement would be that he would be required to be in at

2 a certain hour at night. This is possible.

3 In a general sense, things are not usually
4 ignored.

5 Q Let's be a little more specific, Mr. Cashel.

6 A Surely.

7 Q I would like to direct your attention to
8 Paragraph 2 of this parole contract, which reads: I will
9 not leave the State of New York or any other state to which
10 I may be released or transferred, or any area as defined by
11 the parole officer in writing, without the written or
12 documented permission of my parole officer.

13 Mr. Cashel, are all parolees, no matter
14 how long they have been on parole, required to adhere to
15 that paragraph?

16 A Yes.

17 Q Would you describe what that means in practi-
18 cal terms?

19 A In practical terms --

20 MR. RYAN: If I may, your Honor, I would object
21 to this question and subsequent questions if they are going
22 down the paragraphs of this parole contract.

23 The reason is that the only petitioner here
24 that is on parole is Donna Foggie. If she has violated any
25 of these provisions of the parole contract and has had her

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Cashel - direct

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parole revoked, then I would say that she has standing to

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challenge this parole contract and the conduct of the

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parole office, but as I understand it, she is still on parole,

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she has not violated it, she has not asked to travel, she

6

has not asked to undertake any of the aspects of this parole

7

contract that require approval.

8

She is the only one involved with parole, so

9

I would object.

10

THE COURT: Overruled.

11

Q

Would you describe what that means in practical

12

terms?

13

A

Yes, particularly as it applies to interstate travel among the states. There is such a thing as an interstate compact and all 50 states are signatories to it.

16

17

We are required, if a parolee is going interstate on other than an emergency visit -- and an emergency

18

visit being defined as a death of a family member, but

19

other than an emergency visit, we are required to let the

20

state know the person is coming, how long he is going to

21

stay and where they are going to be staying.

22

23

They are also required to know the criminal background of the person that is making that trip.

24

Q

Do you know fact follow those requirements?

25

A

Yes, we do.

1
2 Q Let me ask you, Mr. Cashel, what would happen
3 if a parolee decided that there were few job opportunities
4 in his field in the New York City area and he wanted to,
5 say, go out to Ohio or Wisconsin and look for job openings,
6 would he be able to do that automatically?

7 A Not automatically, no.

8 Again, we would not be totally sadistic about
9 it, but as soon as we found out about it, we would be required
10 to get in touch with the Ohio authorities and ask them to
11 investigate the situation and see whether or not they
12 want to accept him for supervision.

13 This would be a rather unusual type of situa-
14 tion, but it possibly could happen.

15 Q What would happen, for example, if a New York
16 parolee wanted to move back to a small town in the south,
17 is that a situation which occurs?

18 A Yes, it does occur.

19 Q And what steps would you take in that instance?

20 A We must notify the receiving state, as we
21 call it. They do conduct an investigation.

22 Unfortunately -- I don't want to knock any
23 particular state, nor do I want to be specific, unless it
24 is absolutely necessary, in some of the smaller towns, the
25 investigation might be done by the local sheriff. I have

1 experienced situations where the sheriff has gone around
2 to the house and sais, in essence: We don't need you
3 New Yorkers down here and go back where you belong.
4

5 This is not reflected in the report, I might
6 ad, but it has been reflected to me verbally, personally,
7 by the person on parole who has come back to New York, that
8 he felt awfully uncomfortable in a small town down south.

9 Q Mr. Cashel, I would like to take you back for
10 a moment to the likelihood of a person violating the provi-
11 sions of this parole contract and not having any repre-
12 cussions.

13 I am wondering what would happen, practically
14 speaking, if a person had been on parole for a good number
15 of years, say 20 years, and decided to move to Albany from
16 New York City and decided to get married without, as the
17 parole contract requires in Paragraph 8, consulting with his
18 parole officer, and if this parolee were to say to his parole
19 officer: Look, you have controlled my life long enough, all
20 I want to do is get married and I want to move to Albany and
21 I don't feel I should have to consult with you and I am not
22 doing it.

23 What reprecussion would that have? .

24 A We would arrest him.

25 Q How likely is it that that type of situation

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rgrp Cashel - direct

38

would be discovered as a practical matter?

A Oh, it would be discovered usually without too much difficulty.

There are these days numerous ways that people are apprehended. As soon as he would disappear, we would file a warrant, we would notify the law enforcement agencies throughout the country.

He could not do too much wrong without getting apprehended. It is possible, it does happen, but he would be apprehended.

Q Mr. Cashel, have you formed an opinion as to the effect of being on lifetime parole on a parolee's life expectations?

A Well, again, it is a rather personal opinion, but it seems to me that a person on parole, he cannot hope to achieve a so-called normal existence, for want of a better word. He will always have this type of noose around his neck, this situation that he will live with, and as a result, he rarely aspires to anything more than a lower level of survival. I should say.

This is rather a personal opinion. I know of no studies of this or anything like that.

Q Mr. Cashel, I would like to turn your attention to the possibility of renewed criminal activity by persons

1 rgrp Japha - direct

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2 A N T H O N Y J A P H A , called as a witness,
3 having been first duly sworn by the Clerk of the
4 Court, testified as follows:

5 DIRECT EXAMINATION

xxx

6 BY MR. LIMAN:

7 Q Mr. Japha, what is your occupation?

8 A I am presently the Director of the Drug Law
9 Evaluation Project for the Association of the Bar of the
10 City of New York.

11 Q How long have you held that position?

12 A Since the inception of the project in April,
13 1974.

14 Q What collage did you go to and what degress
15 do you have?

16 A I attended the University of Michigan as an
17 undergraduate and received an A.B. in economics and attended
18 the University of Connecticut Graduate School, where I ob-
19 tained an M.A. in economics.

20 Q When was that, the M.A.?

21 A In 196 -- I think the degree was conferred
22 in '66.

23 Q Would you, rather briefly, tell the Court what
24 your occupations have been since then.

25 A I attended the University of Connecticut for a

2 couple of years after completing the Master's program and then
3 went to the City of New York, to the Budget Bureau in the
4 office of the Mayor, where I was employed between the fall
5 of 1968 and the spring of 1974.

6 Q While you were at the Budget Bureau, did you have
7 any responsibility for the criminal justice system?

8 A Yes. Between the spring of '72 and the time
9 I left, in early '74, I was the assistant director of the
10 budget for protective services and in that capacity, I was
11 responsible for budget designations for the criminal justice
12 system, as well as for the Fire Department and the city's
13 Environmental Protection Administration.

14 Q Could you tell us what the drug law evaluation
15 project is?

16 A The Association of the Bar established a special
17 committee on New York drug law evaluation soon after the laws
18 were put into effect in the fall of 1973, and the project
19 operates a staff to that committee.

20 Q Who heads the committee?

21 A The co-chairmen of the committee are Orvil
22 Shell, Jr., and Bathule Webster. Bailey Manning is the vice-
23 chairman of the committee.

24 Q What are the objectives of the study, the
25 project?

2 A The project, which operates as staff to the
3 committee, is charged with the evaluation of the effects of
4 the 1973 drug-in-sentencing laws and with that broad charge,
5 we are looking at the effects of the law on the criminal
6 justice system and also hope to examine the effects of the
7 law on drug abuse and on crime in New York State.

8 Q How large a staff do you have?

9 A We currently have a full time staff of 12, nine
10 of whom are professionals with various backgrounds, including
11 economics, public administration and law.

12 Q Do your staff members include people who are
13 skilled in the field of statistics?

14 A Yes.

15 Q Does your project have any relationship with
16 the Drug Abuse Council and L.E.A.A.?

17 A The project is financed through grants by the
18 National Institute of Law Enforcement & Criminal Justice
19 of L.E.A.A., and from the Drug Abuse Council as well.

20 Mr. Webster, a co-chairman of the committee,
21 is also chairman of the Drug Abuse Council.

22 Q You have testified that the purpose of the
23 project is to study the drug laws adopted in 1973.

24 What sources of information are available to
25 you in that study?

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Japha - direct

57

A We examined a great deal of information produced by public agencies, both published and unpublished sources.

In addition, we discuss our work with practitioners in the system, with judges, prosecutors, and the defense Bar, and we also discuss our work with academicians in criminal justice sociology and so on.

Q Have you had access to state and city records concerning the indictments under the new law?

A Yes, we have.

Q And concerning the dispositions of indictments under the new law?

A Yes.

Q Including the sentences?

A Yes.

Q Have you analyzed those statistics?

A Yes, we have.

Q Have you published or prepared a report concerning your findings?

A We have.

MR. LIMAN: Just for the record, that report has been premarked as Petitioner's Exhibit 3; am I correct?

THE WITNESS: Yes, that is our report.

Q Would you --

2 A I might say that it is an interim report of
3 the project.

4 Q Do you have information with respect to the
5 number of indictments for drug offenses in the State of
6 New York in the years 1974 and 1975?

7 A Yes, we do. According to the best estimates
8 which we feel are available, there were 10,845 indictments
9 returned under the state drug laws in those years.

10 Q Of that number, how many were for offenses
11 classified as A-1, A-2 and A-3?

12 A Just over 50 per cent were. Our estimate,
13 which comes from public sources, are that 5,689 of those
14 indictments were for Class A felonies.

15 Q What is the public source that you were re-
16 ferring to?

17 A The source is the quarterly felony processing
18 reports of the State Division of Criminal Justice Services.

19 Q Of the 5,689 Class A indictments returned in
20 the state in 1974 and 1975 for drug offenses, do you have
21 a breakdown concerning the A-1's, A-2's and A-3's?

22 A Yes. Of those 5,689, 1,599 were for Class A-1
23 felonies, 1,542 as Class A-2 felonies, and 2,548 as Class
24 A-3 felonies.

25 Q Do you have any statistics concerning what

2 percentage of all convictions under the state drug laws in
3 the A category in 1974 and 1975 were for A-3 offenses?

4 A I believe I do.

5 Q Would it refresh your recollection -- was it
6 34 per cent?

7 A Yes.

8 Q Eighty-four per cent of all of the drug convic-
9 tions in the state were for A-3 --

10 A That's correct.

11 Q In 1974 and 1975?

12 A That's correct.

13 Q You haven't completed a study for 1976; is that
14 correct?

15 A That's correct. We hope to.

16 Q Directing your attention to the City of
17 New York, have you given some special study to the statistics
18 for drug indictments in the City of New York?

19 A Yes, we have.

20 Q And can you tell me approximately what percent-
21 age of all drug indictments in the years 1974 and 1975 in
22 the City of New York were for A felonies?

23 MR. RYAN: Excuse me, your Honor, if I may.

24 May I ask that if he is referring to his re-
25 port, that if that information is in his report, that the

1 rgrp

Japha - direct

60

2 page number that you are looking at or referring to be told
3 so I can follow it.

4 THE COURT: Yes, certainly.

5 THE WITNESS: I am not referring directly to
6 the report. Some of these numbers may be in the report,
7 but I don't have the report in front of me, I am not referring
8 to it at the moment.

9 THE COURT: You are referring to notes you made
10 from your report?

11 THE WITNESS: Yes. Partially from the report
12 and partially these figures are updates of figures in the
13 report.

14 The figures I am citing now are more current
15 than the figures in the report, if they differ from those in
16 the report.

17 THE COURT: Suppose you take the report and
18 wherever possible, point out the page in the report for
19 Mr. Ryan's benefit.

20 THE WITNESS: I will try.

21 The figures in the report, Mr. Ryan, which
22 come closes to the figures I recited about the state, appear
23 in Section 2 of the report and the figures regarding indict-
24 ments and dispositions in New York City would appear in
25 Section 6, although, let me say again, that they may not

2 match number for number because we have tried wherever possible
3 to provide the latest available data in this testimony.

4 Q Can you tell me what percentage of the drug
5 indictments in New York City in 1974 and 1975 were for
6 Class A offenses?

7 A Approximately 75 per cent of those indictments.

8 Q Do you have a breakdown in percentage between
9 A-1, A-2 and A-3?

10 A Yes. Approximately 35 per cent were for A-1
11 offense, 28 per cent for A-2 offenses, and 36 per cent for
12 A-3 offenses.

13 Q All told, how many Class A drug indictments
14 were there in the City of New York in '74 and '75?

15 A Including several returned in the last four
16 months of '73, there were 3,978.

17 Q Have you made a study of the dispositions of
18 A-1 and A-2 offenses in the City of New York in the year
19 1974 and in the year 1975?

20 A Yes, we have.

21 Q Could you describe for the Court your method-
22 ology in making this study?

23 A We collected a random sample of indictments
24 which ultimately led to convictions in New York City and in
25 several non-New York City counties in the State.

4 Q Based on that sample, did you make an effort
5 to determine what percentage of the A-1 and A-2 indictments
6 were settled by reduced pleas?

8 Q Did you make an effort to study that for the
9 City of New York?

11 Q Would you tell us what your conclusions were
12 for the years 1974 and 1975?

18 Among Class A-2 indictments, we estimate that
19 73 per cent where ultimately disposed as Class A-3 charges.

22 (Record read.)

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE
FOLEY SQUARE, NEW YORK, N.Y. - 791-1020

2 offenses where the indictment charged either A-1 or A-2 of-
3 fenses and was reduced to A-3?

4 A Yes, we have.

5 Q Can you tell me whether you have statistics
6 as to the percentage of A-1 and A-2 indictees who pled to
7 an A-3 offense received the minimum sentence of one year to
8 life, what percentage of those did?

9 A Yes. We estimate that 57 per cent of that
10 group received the minimum sentence of one year to life.

11 Q That's in the City of New York?

12 A In the City of New York.

13 THE COURT: Those were originally A-1 offenses?

14 THE WITNESS: A-1 and A-2 offenses.

15 Q What percentage of the persons indicted origin-
16 ally for A-3 and were sentenced as A-3 offenders received
17 the minimum sentence of one year to life?

18 A In New York City a comparable figure would
19 be 46 per cent.

20 Q Did you also make a study employing your
21 sampling techniques statewide?

22 A Yes.

23 Q Did you reach any conclusions as to whether
24 it was more likely tht somebody would receive a sentence
25 greater than the minimum of one year to life if his indictment

2 started as an A-1 or A-2 as opposed to an A-3?

3 A We found that the likelihood of receiving a
4 more serious sentence than the minimum was not significantly
5 different for the two groups. That is one group which began
6 as indictments to either an A-1 or an A-2 felony and the
7 other group being the class of A-3 indictments.

8 Q Do you know how many sentences were actually
9 given under the new law for A offenses by the end of 1975?

10 A Yes. That number is slightly over 1,100
11 statewide.

12 MR. RYAN: I'm sorry, could you please repeat
13 that question and the answer?

14 MR. LIMAN: Slightly over 1,100.

15 MR. RYAN: And the question was?

16 MR. LIMAN: Do you want to read back the ques-
17 tion; is that okay, your Honor?

18 THE COURT: Yes, certainly.

19 (Record read.)

20 THE WITNESS: May I amend my answer, your Honor?

21 THE COURT: Yes.

22 THE WITNESS: 1,100 prison sentences. There
23 were additional sentences in the Class A category. There
24 were eleven hundred-off prison sentences in that category.

25 Q When you say other sentences, are you referring

2 to people who received the dispensation that the prosecutor
3 may give if he finds that the person has cooperated?

4 A Yes.

5 Q And where probation can be given in the cir-
6 cumstances where the prosecutor and the court find some
7 form of cooperation?

8 A That case, as well as the case in which the
9 defendant is adjudicated as a youthful offender.

10 Q Right.

11 THE COURT: Where the prosecutor and the court
12 agree that the defendant has cooperated, what cases are those?

13 THE WITNESS: The Y.O. cases, the youthful
14 offender cases where defendants aged 16, 17 and 18 may be
15 relieved of a prison term by some judicial interpretation,
16 they may be relieved of a prison term under the Class A-3
17 provisions.

18 THE COURT: It applies only to youthful offender

19 THE WITNESS: In addition to the class which
20 Mr. Liman referred to, that is the class in which defendants
21 may be granted lifetime probation if they are found to have
22 provided useful information to the prosecution, so there
23 are two cases, two provisions under which a defendant,
24 convicted of an A-3 crime, may be sentenced to probation:
25 One is the class of defendant who provided useful information

1 Japha - direct

66

2 to the prosecution; the other is the class adjudicated
3 as youthful offenders.

4 THE COURT: Is that in the statute?

5 MR. LIMAN: Your Honor, it is Penal Law
6 Section 651(b) and it provides that if the district attorney
7 recommends lifetime probation because of the defendant's
8 cooperation, that the court can grant that, but it has to
9 be initiated by the prosecutor.

10 THE COURT: Yes, I was just wondering whether
11 it had a statutory basis.

12 MR. LIMAN: Yes. It is 651(b) in the New York
13 Penal Law.

14 Q Mr. Japha, did you make any study to determine
15 the number of persons who were committed to prison under
16 the new law who had no prior offense reflected on their
17 rap sheet?

18 A Yes, we did.

19 Q Did you do that for the number of persons
20 committed to prison in the year 1974?

21 A Yes, we did make such a study.

22 Q Do you know what your statistics were for that
23 year?

24 A Yes. We estimate that -- these are statewide
25 statistics, Mr. Liman.

1 rgrp Japha - direct

67

2 Q Yes.

3 A Of the roughly 530 persons sentenced to prison
4 under the drug laws in 1974, we estimate that approximately
5 200 were offenders facing a felony for the first time and
6 among Class A cases, specifically, of approximately 300
7 sentenced to prison, we estimate that 95 or approximately
8 32 per cent, were offenders facing their first felony charge.

9 Q Mr. Japha, did you have an opportunity to
10 make the same study for 1975?

11 A No, we have not yet had such an opportunity.

12 Q Did you, in the course of your study of these
13 statistics, observe the amount of narcotics, the dollar
14 amount of narcotics involved in some of the cases in which
15 indictments were returned?

16 A Yes.

17 Q And were there some cases brought under A-3
18 in which the amount was \$10 of cocaine?

19 A I believe so, yes.

20 THE COURT: Excuse me just a moment.

21 (Pause.)

22 Q Finally, did you compare the number of disposi-
23 tions and prison sentences under the new law with those which
24 occurred in 1973, before the law took effect?

25 A Yes, we have made such a comparison.

2 Q What did you find with respect to the year 1975?

3 A We found that for both the number of disposi-
4 tions and the number of prison sentences imposed in Superior
5 Courts, the 1975 figures were below the comparable figures
6 for 1973.

7 Q That means less drug cases were disposed of
8 in the Superior Courts and less persons were committed to
9 prison in 1975 than in 1973?

10 A That's correct.

11 Q And was the same true in 1974?

12 A Yes, it was.

13 MR. LIMAN: I have no further questions.

14 XXXXX

CROSS-EXAMINATION

15 BY MR. RYAN:

16 Q Mr. Japha, the report that you prepared and
17 is now an exhibit, is that the staff report of the Drug
18 Evaluation Project, August, 1976?

19 A Yes.

20 THE COURT: Excuse me, did we receive it as
21 an exhibit?

22 MR. LIMAN: No. It wasn't offered yet. I
23 can offer it now, your Honor.

24 THE COURT: All right. Is there any objection?

25 MR. RYAN: No, your Honor.

2 A Yes, I would. I think we referred to it
3 in those terms in our report.

4 Q And that's the year in which new courts were
5 opened up, new judges were being appointed to deal with
6 this law?

7 A Yes.

8 Q And in fact a new prosecutor's office was
9 instituted?

10 A Which prosecutor's office?

11 Q The Special Narcotics Prosecutor.

12 A No. I believe that office began in 1972
13 under a federal grant originally and incorporated the
14 Emergency Dangerous Drug Parts when they were opened.

15 Q They staffed the drug parts?

16 A Yes.

17 Q The citywide drug parts?

18 A Well, at least those parts in Manhattan. I
19 am not certain about the other boroughs.

20 MR. RYAN: I have no further questions.

21 REDIRECT EXAMINATION

22 BY MR. LIMAN:

23 Q Mr. Japha, just so we can make clear certain
24 things, you were asked questions about the percentage of
25 persons convicted of A drug felonies, Class A drug felonies,

1 who received jail sentences and you said you didn't have
2 that figure at hand.

3
4 Am I correct that under the law, every person
5 convicted of an A felony must receive a term of imprison-
6 ment except for youthful offenders and persons who received
7 a recommendation from a prosecutor accepted by the court
8 of lifetime probation for cooperation?

9 A I believe that's correct.

10 Q And is it also fair to say that the number of
11 cases in which the prosecutor recommended a sentence of
12 lifetime probation for cooperation have not amounted to a
13 significant percentage of the number of A cases?

14 A We have just examined that in the report I
15 mentioned five minutes ago, and I will be happy to look in
16 there.

17 Q You don't recall?

18 A My recollection is on the order of 10 per cent,
19 but I would prefer to rely on the statistics.

20 Q And you also understand that if the defendant
21 is a low-level dealer in cocaine who has nobody to turn in,
22 that he is not eligible for lifetime probation under this
23 statute?

24 A That's my understanding.

25 Q You were asked about the dollar value of cases

under the A laws.

Is it your understanding, Mr. Japha, that if somebody sells or offers to sell or makes a gift of an eighth of an ounce of a narcotic, including cocaine, including the dilutant, that that is an A-2 felony?

A I believe that's correct.

Q And so that the A-3's are less than an eight of an ounce?

A That's correct.

Q You testified that your evaluation has not been completed; am I correct?

A That's right, yes.

Q And your evaluation includes a study of the impact of the law on the courts and the impact on drug abuse; am I correct?

A Yes.

Q But the statistics that you have given this Court for the years 1974 and 1975 are statistics in which you have confidence; am I correct?

A Yes, they are.

Q When you talked about your evaluation not being complete, you weren't suggesting that your statistics for those years were not reliable statistics, were you?

A No, I was not. I was referring only to our

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UNITED STATES OF AMERICA ex rel
MARTHA CARLONA, et al.,

vs.

75 Civ. 6219

BENJAMIN WARD, etc., et al.

New York City, New York
Room 2704

November 10, 1976

* * * *

(In open Court.)

D A V I D R U D E N S T I N E , called as a witness
on behalf of the petitioners, after being first duly
sworn, was examined and testified as follows:

XXXX

DIRECT EXAMINATION

BY MS. DU BOIS:

Q Mr. Rudenstine, would you describe your educa-
tional background?

A I went to Yale University and studied American
history between 1959 and '63, did a year of graduate work
at Yale in American history.

I was in the Peace Corps for a few years in
the middle 60's and then went to NYU Law School from '67 to
'69, and I ahve been practicing law in New York since then.

Q Were you the director of the Citizens Inquiry
on Parole and Criminal Justice?

1
2 A Yes, I was.

3 Q What was the nature and purpose of the Citizens
4 Inquiry study?

5 A The McKay Report on the Attica uprising came
6 out in September of 1972. Prior to its release, there had
7 been a growing impression amongst a lot of people that the
8 problems of parole were one of the major sources of tensions
9 inside the prison prior to the uprising.

10 In response to that, a number of concerned
11 citizens began to put together a group which came to be
12 called the Citizens Inquiry on Parole and Criminal Justice.
13 That was in the summer of 1972, and I was the first director
14 of the organization.

15 It was intended to be, and it was in fact,
16 a non-profit research corporation which was funded by found-
17 tions, mostly all located hear in New York City.

18 Q And what did your study focus on?

19 Well, did it focus on both the parole release
20 decision process and parole surveillance?

21 A Well, during the two years that I was director
22 from '72 to '74, we did a long study of the New York State
23 parole system and we looked at both functions, the discretiona
24 release stage and the post-release community supervision
25 stage.

2 Q And did you produce a report?

3 A Yes, we did. We produced a report which has--
4 been published by Praeger Publishers under the title of
5 "Prison Without Walls."

6 Q Was that a staff report or a report by the
7 Citizens Inquiry?

8 A It was a report which was written by the
9 staff, submitted to the Board of Directors and approved
10 by the Board of Directors as its report.

11 Q Would you describe your role in the study and
12 in the investigations that the group conducted?

13 A I was the staff director. We had a small
14 staff of three full-time people and four or five, I guess
15 the number varied slightly, of part-time people, and as
16 director, I had primary responsibility for determining
17 essentially the scope of the study, the methodology and
18 primarily the responsibility for writing the report.

19 Q What kind of investigation did you conduct
20 during the two years?

21 A Well, we did a combination of what you might
22 call loosely library work and field work. The field work
23 included observation of 210 parole hearings in New York
24 State at I think five or six different institutions.

25 I personally did all of those observations.

2 In addition, I personally interviewed about
3 30 parole officials in different positions around New York
4 State, including the Commissioner of Correctional Services,
5 the chairman of the Parole Board, the area supervisor of
four or five or possibly six of the major area parole offices
7 around New York State. And then seven, eight, nine, ten,
8 something like that, parole officers.

9 In addition to that my staff interviewed a
10 hundred to 110 parolees who were currently under supervision.

11 The library work consisted of reviewing all
12 of the annual reports of the New York Parole Board, I think,
13 going back to 1930. Most of the basic literature relevant
14 to parole and a lot of the studies that the New York State
15 Board of Parole had done trying to evaluate its own effective-
16 ness.

17 Q Have you kept up with how the parole system
18 operates since the time of your study?

19 A Yes, I have. I am currently with the New York
20 Civil Liberties Union and am head of a project called the
21 Project on Sentencing and Parole.

22 In that capacity, a lot of my work on a daily
23 basis keeps me in touch with the New York State parole system.

24 In addition to that, I am on the Board of
25 Directors of a number of organizations which are active in

1 the corrections field, and that on a routine basis brings
2 me in contact with developments in the statewide system.

3
4 Further, I had met Joe Olgiati, who was desig-
5 nated as chairman of the New York State Parole Board,
6 I believe, by Governor Carey last December, December of '75.
7 He died over the summer, but during that six, seven-month
8 period while he was chairman, he and I met probably half
9 a dozen times and talked about parole policies, practices
10 and what his plans were.

11 Q Are you aware of any significant changes in
12 either the parole release or the parole supervision process
13 since the time of your report?

14 A I would say no change which would be signifi-
15 cant improvements in the system. I believe the system has
16 come under increasing pressure because of the increase in
17 state prison population, and that may in fact have
18 caused further deterioration in some of the processes
19 which we, when we did the report three and a half years ago,
20 already thought were very deteriorating.

21 Q I would like to focus first on your investiga-
22 tion of the parole release decision process and ask you
23 whether you first can describe the standards by which the
24 Parole Board makes decisions as to whether or when a person
25 will be released from prison?

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MR. RYAN: I object to the question, not being relevant to the petitioners in this case.

Nobody here has been denied a release on parole. None of the petitioners would be eligible for release on parole, if in fact they were on parole.

Only one of them is on parole now.

MS. DU BOIS: Your Honor, the relevance of this question and the relevance of what we are going at in this case is the lifetime maximum sentence to which all persons under the drug law are subjected.

The thrust of our case is that that lifetime sentence is imposed arbitrarily on a felony offender. A key aspect of the arbitrariness is, in our view, the manner in which the parole release decision is made, because that is a decision by which it is determined whether most offenders get as little as one year or as much as life, as a matter of fact.

We are not challenging the parole release process per se, but we are challenging the lifetime sentence. Obviously all the petitioners have standing with respect to that.

THE COURT: Do you want to reply?

MR. RYAN: Yes, your Honor.

I submit that the only person on parole in this

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case is Donna Foggie. If under the parole release mechanism as they operate, as you heard yesterday, essentially on a five-year basis, Donna Foggie were eligible, I would say that perhaps she would have standing. Otherwise it is a mere conjecture when Donna Foggie has been on parole for five years, what will happen to her, what the state of the law will be then.

And to go into this, your Honor, I submit, is outside of the scope of the petition, number one, and I'm sure Mr. Rudenstine knows well that it is part of several cases that he has brought in the District Court.

THE COURT: The objection is overruled.

BY MS. DUBOIS:

Q Mr. Rudenstine, would you describe the standards by which the Parole Board makes the decision as to whether or when a person is released from prison.

A The Parole Board is basically guided by a statutory standard, or at least that's the intended guideline, Correction Law Section 213, which consists of a two-part test. One part is that the Parole Board will release an inmate on parole when it believes that the inmate will remain at liberty without violating the law.

Part two of the test is that the release of the inmate will not be incompatible with the welfare of

2 society.

3 That statute took its current form back in
4 1930 and has been modified since then.

5 During the 40 years, 45 years since the
6 Parole Board has been in operation, they have promulgated
7 relations amplifying this statute.

8 The regulations consist of about 125 words and
9 they are prefaced by language which says that the following
10 are only some of the considerations that we will have in mind.

11 Because of the dearth of material both
12 in the statute and the regulations, the only way to really
13 have a sense as to what the Parole Board actually considers
14 in making a decision is to observe the hearings.

15 They haven't published anything in addition
16 to this material. The observations that I made of the
17 hearings led me to conclude that there were several factors
18 that the Parole Board had in mind when it made its decision,
19 multiple in nature, inconsistent in purpose, and that one
20 could not be convinced with any certainty at all which
21 factor would be paramount in controlling a given case.

22 MR. RYAN: I move to strike that entire answer,
23 your Honor. That's conclusory. He had established no
24 foundation for it, and it is speculative.

25 THE COURT: Let me hear the answer, Mr. Reporter.

(Question and answer read.)

THE COURT: The objection is overruled.

THE WITNESS: Your Honor, the transcript read that the statute had been modified since 1930. I intended to say, and I thought I had said, that the statute had not been modified since 1930.

THE COURT: The reporter will note that.

THE WITNESS: The factors that I noted and which are presented in the report are some of the following, for example: An inmate will not be released on parole if he has a poor prison discipline record. He will not be released on parole if the Parole Board believed he has not served what they generally call an appropriate period of time.

How an appropriate period of time was determined was most unclear. I think the report indicated that the best one could do would be to assume that the Parole Board was gauging the severity of the offense and making some kind of rough calculation which was essentially intuitive in nature as to what an appropriate period of prison would be for that period of offense.

MR. RYAN: I have the same objection on the speculation of what the Parole Board's decision was in making its decision without continually interrupting.

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2 THE COURT: You may.

3 As I understand it, Mr. Rudenstine has been
4 called as an expert on this?

5 MS. DU BOIS: Yes, your Honor.

6 THE COURT: He is entitled to state his
7 opinions then.

8 Proceed.

9 THE WITNESS: My observations also led me to
10 conclude that the Parole Board was often influenced by what
11 it considered to be the sensitivity of a particular case
12 in making a release decision.

13 If a case had, at the time of trial or con-
14 viction, attracted a lot of public attention so that the
15 release of that particular person might, on parole at that
16 particular time, might create public criticism, the Parole
17 Board would consider that in deciding whether or not to
18 release a person on parole.

19 The Parole Board also had what has been called
20 in the report a quasi-rehabilitation test which included
21 several factors, such as the adjustment of the inmate to
22 prison, whether or not he showed any remorse towards his
23 particular crime, any particular insight as to why he did
24 it, some sense of realistic parole plans and the like, and
25 the Parole Board would question the inmate and examine the

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2 case file of a particular person with regard to some of these
3 factors in deciding whether or not it considered the person--
4 to be ready to be released on parole.

5 Q Mr. Rudenstine, is it my understanding that the
6 factors you just laid out, you discovered by virtue of
7 watching different hearings and seeing that they were applied
8 at some times in certain hearings, or are they derived from
9 the statute or from the regulations?

10 A No, they are derived from observation. I
11 was in the room with the three Parole Board members.
12 I was in the room before the inmate came in, I was in the
13 room when the inmate was there and I was in the room when the
14 inmate left, and when the decision was made.

15 I heard the entire discussion about each of
16 the particular cases.

17 Q Is there anything written that sets out these
18 factors that you described, or did you discover them simply
19 from observation?

20 A Nothing that the Parole Board has offered
21 that I am aware of.

22 Q Does the Parole Board keep track of decisions
23 and does it have any formalized precedent that it can look
24 to in making its decisions?

25 A Well, when we did the parole report, the

2 Parole Board did not give detailed reasons. They simply made
3 a notation whether or not the parole was granted and
4 denied. That was the extent of it.

5 The inmate did not get a reason of explana-
6 tion, if in fact parole was denied.

7 In addition to that, there was no feedback
8 system, one might say. That is to say, the decisions were
9 not plugged into any kind of computer retrieval system
10 which would then release, some time in the future, data
11 relevant to whether or not the person has had a success-
12 ful or an unsuccessful parole.

13 Our study was designed or intended to try
14 to evaluate the effectiveness of the parole in making
15 its decisions and we investigated the possibility of such
16 a feedback system quite thoroughly with the Parole Board
17 chairman and with the research people up in Albany.

18 They simply did not have that kind of a
19 feedback system.

20 Q Would you describe the nature of the hearings
21 at which parole release decisions are made?

22 A The hearings are very similar to one another,
23 and they have the following basic characteristics:
24 Essentially they are very short in nature. We found most
25 hearings didn't last more than 10 or 12 minutes. Most

2 hearings fell between six and 12 minutes, I believe the
3 report said.

4 The McKay Commission report that did the
5 study of the Attica crisis found they lasted 5.7 minutes,
6 I believe, or 5.6 minutes.

7 I saw some parole release hearings that
8 were as short as two or three minutes. I saw a few
9 out of the 210 hearings that were more than 10 or 12 minutes.

10 Secondly, the Parole Board, at the time it
11 conducts the hearing, consists of three panel members.
12 In order for parole to be granted, there has to be unanimous
13 vote by all three panel members.

14 However, only one of the three panel members
15 has the case file of the individual inmate that appears
16 before it. They don't have triplicate copies of the file.
17 So only one of them reads the file.

18 That file is read during the interview of
19 the previous inmate, because they don't get the files in
20 advance of arriving at the institution. So that during
21 a particular hearing of a given inmate, one of the board
22 members is conducting the interview, he read the file just
23 a few minutes before during the previous interview.

24 During that interview, the other two board
25 members are reading the files of the inmates who are following

2 this particular inmate.

3 The form of the interview tends to be very
4 routine. The questions asked are very similar from one
5 hearing to another and, again, they are short.

6 Upon the completion of the hearing, the
7 inmate will leave the room and at that time, before the next
8 hearing begins, the Parole Panel, at that time, will make
9 the decision as to whether or not to grant or deny parole.

10 THE COURT: You say before he leaves the room?

11 THE WITNESS: No. He will leave the room and
12 before the next hearing begins.

13 The amount of time given to making a decision
14 varies between a few seconds and three or four minutes.

15 Of the hearings that I saw, I don't think
16 that the amount of discussion on a given case ever exceeded
17 three or four minutes, and I saw many hearings where the
18 minute hand did not move before a decision was made.

19 The inmate will be notified of the decision
20 once the Parole Board leaves the institution. So if it
21 is a major institution like Auburn or Attica, it will
22 take two or three days before all the hearings are completed.

23 The smaller institutions will find out that
24 day.

25 Now, because of state statute, he will be

2 given a denial reason if he is denied a parole.

3 There is no administrative review or appeal
4 if you are denied parole, and under New York State law,
5 there is no judicial review of a denial reason if you are
6 denied parole.

7 So that essentially goes on, whether or not
8 you are granted or denied parole as determined by the
9 Parole Panel with essentially no review.

10 THE COURT: But in most cases, there is no
11 reason given, is that what you said?

12 THE WITNESS: No. Only when a parole is de-
13 nied is a reason given.

14 THE COURT: I see. A reason is always given,
15 is that it?

16 THE WITNESS: That's right.

17 Now, during the last year and a half or two,
18 I can't remember exactly when the statute became effective
19 but I believe it was in July or August, 1975, the New York
20 State Parole Board must give a reason if it denies parole.

21 THE COURT: But there is no judicial review?

22 THE WITNESS: No, none.

23 THE COURT: Or any other review?

24 THE WITNESS: No formalized administrative
25 appeal.

2 THE COURT: I see.

3 BY MS. DUBOIS:

4 Q First of all, what form do these decisions,
5 those reasons now take?

6 Are those long sort of opinions giving reasons
7 to the prisoner or are they relatively short?

8 A They are essentially -- they often track
9 the statute so that a denial reason will often read some-
10 thing like "Parole is denied because it is not believed
11 that the inmate will remain at liberty without violating
12 the law," or that release is compatible with the welfare
13 of society.

14 Often they will make reference to the severity
15 of the offense, the failure of the inmate to have any
16 remorse or insight as to why he committed a particular crime.

17 They are not findings of fact and elaborations
18 of considerations. They are not that.

19 Q And on a subsequent parole hearing, does the
20 Parole Panel have available to it any transcript of the
21 discussion during which it decided at the prior time to
22 deny parole?

23 A There is a transcript kept of the hearing
24 itself, but the transcript begins when the inmate walks
25 into the room and it terminates when the inmate leaves the

2 room. So that during the moments when the Parole Board
3 reaches -- the Parole Panel reaches its decision, there is
4 no transcript.

5 Q Mr. Rudenstine, there has been previous testimony
6 in this case that 75 per cent of all prisoners are paroled
7 at their original eligibility date.

8 Could you tell the Court how the original eli-
9 gibility date is set?

10 A By the original eligibility date, I would
11 call that the minimum ter.

12 Under New York law, you are eligible for parole
13 consideration when you complete your minimum term. Who
14 sets that depends upon the class of felony that you have
15 been convicted of.

16 If it's Class A, a Class A felony, a judge is
17 required, I believe, by the statute to set that. If it's
18 Class E, the judge may not set it and the Parole Board must
19 set it, and it does so during the tenth month of your
20 imprisonment.

21 If it is Class B, C or D, the judge has the
22 option of setting your minimum term. If he does not set
23 it, then the Parole Board must set it. Again, it must set
24 during the tenth month of incarceration.

25 When we did the report, we found that about

2 90 per cent of the cases judges chose not to set the mini-
3 mum term. So that for Class B, C and D felonies, the
4 Parole Board was setting the minimum term in most cases
5 and it always had to set it in a Class E felony.

6 Q Is it my understanding the Parole Board in
7 most cases makes two major decisions, first, it sets the
8 minimum term and then, secondly, it makes the decision we
9 have just talked about as to whether to release the prisoner
10 at that term, and the 75 per cent figure relates only to
11 the second decision?

12 A That's correct.

13 I would like to clarify one other thing.

14 The language in which you frame the question
15 suggested that the parole will be granted upon the completion
16 of the minimum term which will be the minimum of what the
17 minimum term may be.

18 In other words, it may be as low as it
19 possibly can be. That is not my opinion of what happens.
20 The minimum term in New York may be as short as one year
21 in every single offense except a Class A felony. And my
22 opinion is that that is not the length of the minimum term
23 in nearly all cases.

24 THE COURT: That's not the minimum term?
25 You mean it is higher or lower?

2 THE WITNESS: The minimum term will be higher
3 than what the lowest minimum term may be.

4 BY MS. DU BOIS:

5 Q You previously testified that you looked at
6 the criteria as actually applied to a large number of prisoners
7 to determine how this criteria worked out in fact when
8 people were released.

9 I would like to ask you on the basis of your
10 investigation whether, if you took two offenders with similar
11 case histories, convicted of similar offenses, having similar
12 backgrounds and having similar prison records, would it be
13 your opinion that those two people would be release after
14 substantially the same amount of time by the Parole Board?

15 A I don't believe that we are able to make that
16 assessment, given what the parole practices are, because
17 there is such broad discretion vested in the Parole Panel and
18 because there is a near absence of procedural safeguards
19 that would insure equity in making parole decisions.

20 I don't think that we can say with any certainty
21 or sureness at all that people who have had similar criminal
22 records will be treated similarly by the Parole Board.
23 And that conclusion, I think, is enhanced further by the fact
24 that the Parole Board, in making its decisions, often is
25 influenced by what occurs during the period of incarceration.

2 So that even though you might have hypothetically
3 two prisoners who are roughly the same in terms of criminal
4 records at the time of convictions, what happens to them
5 during the period of incarceration may be unimportant from
6 one point of view, but from the Parole Panel's point of view
7 may be important so that their treatment may end up being
8 significantly different.

9 Q What kind of factors would the Parole Board
10 take into account as to the period of incarceration?

11 Indeed, what factors is it mandatory that be
12 included in the parole summary form with respect to behavior
13 during imprisonment?

14 A The parole summary form is actually quite --
15 encompasses an awful lot. The major factor, I believe, that
16 can affect the parole outcome is going to be prison discipline.
17 Prison disciplinary record.

18 The Parole Board, even though it is quite
19 independent from the Department of Correctional Services
20 and exists as a separate entity from the wardens and from
21 commissioner's ward who administers the prison system, pays
22 a lot of deference to the -- the Parole Board nevertheless
23 pays considerable deference to the considerations of the
24 wardens and of what the prison administrators want.

25 Prisoners who have a bad disciplinary record

2 are often denied parole because it is feared that if they
3 are granted parole, prison discipline will be diminished.

4 Whether or not that is true and whether or not
5 that is an appropriate consideration under the statute,
6 those are other questions.

7 But the fact of the matter is that the parole
8 will be substantially influenced by what the prison discipline
9 record is.

10 Q Does the parole summary form include questions
11 and evaluations regarding such things as religious habit ,
12 sexual habits, whether or not there has been cooperation
13 with psychiatrists?

14 A I believe so. I'm just not certain. I believe
15 that the parole summary form is outlined in great detail in
16 "Prison Without Walls."

17 Q Mr. Rudenstine, under the 1973 drug law, there
18 is a life maximum provided for all felons with two very
19 limited exceptions. Based on your investigation, would you
20 have any reason to conclude whether or not this life maximum
21 would affect the ability to predict when a drug offender
22 would be released?

23 Would you be more able or less able to predict?

24 A I think the imposition of a life term increases
25 the possibility of uneven or disparity treatment of offenders

2 by the Parole Board.

3 We found that the Parole Board was often
4 guided by an informal rule of thumb in making its release
5 decisions, and that informal rule of thumb was essentially that
6 a person would probably be released on parole upon completion
7 of one-third of his maximum term imposed.

8 So that if a prison had a six-year maximum
9 term, the probability of being released on parole after
10 completion of two years imprisonment was fairly good.

11 Once you move to a life term maximum, that
12 rule of thumb breaks down because there simply is no one-
13 third of a life-term that you can calculate.

14 I witnessed some parole hearings of A felons
15 who had life sentences and I did not see the emergence of
16 a similar rule of thumb with regard to that.

17 So with regard to drug felons or drug offenders
18 who are being sentenced under the drug law and given a maximum
19 term of life, the old informal rule of thumb would not be —
20 applicable.

21 Whether or not the Parole Board has adopted a
22 new one or has informally given rise to one, I'm just not
23 certain.

24 Q Mr. Rudenstine, what about a rule of thumb
25 with respect to what one might consider obviously marginal

2 offenders.

3 Let us assume under the drug law we had a
4 person who would fall into the A-3 category because they
5 had sold, say, \$10 worth of cocaine or indeed given \$10
6 worth of cocaine to a friend.

7 If that person came up for parole and was
8 given a one to life sentence and came up for eligibility
9 for parole at the one-year time, could you predict fairly
10 certainly that that person would be very likely to get out
11 at the one-year minimum?

12 A You could not predict with any certainty.
13 It's, of course, possible that the person could be paroled
14 but I don't think there is any certainty that the person
15 would be paroled.

16 Q Is there a very strong likelihood that they
17 would be paroled at that time?

18 A I think it is impossible to say. I think
19 that given the variety of the criteria that the Parole
20 Board uses in making its decisions and the fact of depending
21 on what criteria you use, you will have a different outcome,
22 that it is nearly impossible to say whether a person will be
23 released upon the completion of a one-year minimum term.

24 Q I would like to go on and focus on your investi-
25 gation of the parole supervision process and ask you, first,

2 just generally, what limits restricts the freedom of a
3 parolee?

4 By law, what sets the limits?

5 A I think there are two things to consider,
6 one is the parole contract itself, which in New York is a
7 standard form contract.

8 I think "Contract" is probably an inappropriate
9 term. It's a written document which the prisoner must sign
10 prior to release. Failure to sign it will result in continued
11 incarceration.

12 That document consists of 14 conditions which
13 actually have very many subdivisions to them, and if you
14 count them all up, I think the number of parole conditions
15 in New York amount to about 50 all together.

16 So that is one source which imposes limits on
17 a parolee during the period of community supervision.

18 The other source of authority which imposes
19 limits on the parolee is the parole officer himself. Under
20 New York law, the parole officer is vested with considerable
21 discretionary powers, including the power to impose any
22 additional condition on a parolee. So that a parolee's
23 limits or freedom or conditional freedom, if you like, is
24 subject to, (a) a parole contract or a parole agreement,
25 and (b), I think the discretionary power of the parole

2 officer.

3 Q I would like to show you a copy of what was
4 introduced as Plaintiffs' Exhibit 9, which is the present
5 parole contract, and ask you whether you have examined it prev
6 ious to your testimony.

7 A Yes.

8 Q And is it essentially the same as the contract
9 that you described in the report?

10 A Yes, I believe it is.

11 Q Section 2 of that contract state, "I will not
12 leave," and it talks about the State of New York or any
13 other state, or, "Or any area as defined by the parole
14 officer in writing."

15 On the basis of your investigation, do parole
16 officers restrict in fact parolees to an area smaller
17 than the state?

18 A Well, yes. The answer is yes, but it is not
19 just the parole officer that does the restriction. My
20 impression, after having surveyed about a half dozen of the
21 area parole officers in New York State, was that the area
22 parole office itself had a policy of restricting all
23 parolees assigned to it, restricting the geography in which
24 that parolee may travel.

25 If you were a parolee under the supervision

2 of a parole officer assigned to the New York City office,
3 the geographical area in which you could travel without
4 having to get prior permission from your parole officer was
5 determined by the area director, and essentially was
6 New York City, the five boroughs.

7 Similar policies apply in Buffalo, Syracuse,
8 Rochester, Hempstead, Poughkeepsie. I believe in the other
9 area offices as well.

10 So that a parolee was substantially restricted
11 in his travel.

12 Q Did that have any practical impact on the lives
13 of parolees?

14 A Substantial impact. Forgetting the possibilities
15 of getting employment outside of your area, it had -- which
16 I think is very serious, it had a tremendous impact on the
17 ability of a parolee to exercise, I suppose what one might
18 call simply a sort of socialization rights of sorts.

19 I often came in contact with people who were
20 living on the periphery of the geographical area in which
21 they could travel, for example, in the Bronx, and they wanted
22 to go to Westchester and they couldn't do it.

23 It had a tremendous inhibiting factor in their
24 family life and the way they could relate to their wives
25 and parents.

2 Because the New York State Parole Service does
3 not have 24-hour-a-day, seven-day-a-week service, it's just
4 impossible for a parolee to get permission on the spur of the
5 moment to take a trip outside of the geographical area.
6 And you can't do it on a weekend, can't do it in the evening
7 and the like.

8 In addition to that, essentially the parole
9 officer would be the one who would have to give you permission
10 Because of his duties he is often out of the office and
11 impossible to reach. So if you wanted to get permission,
12 even during the course of a normal business day, it would
13 be very difficult because the parole officer would be
14 unavailable.

15 Q Section 4(b) and Section 6(c) of the contract
16 provide that a parolee has to obtain approval of any change
17 in residence and of any change in employment.

18 Based on your investigation, could you describe
19 what kind of impact this has on the lives of parolees?

20 A Well, on the face of it, the conditions seem
21 somewhat harmless other than simply the intrusion they make
22 in having you make a phone call. But after conversations with
23 a lot of parolees and with parole officers, one finds that
24 approval is often withheld and withheld for reasons that
25 are difficult to understand.

2 A parole officer may withhold reason for just about
3 -- withhold approval for any reason he wants, and because
4 of the broad discretionary powers vested in him in the absence
5 of administrative control over the exercises of those powers,
6 a parolee who is denied permission to change residence or
7 employment essentially has no recourse.

8 Q Section 4(d) provides that curfews can be
9 imposed.

10 Are they ever, in fact?

11 A Yes, they are imposed almost like travel
12 restrictions. At least with regard to some parole area of-
13 fices.

14 The Buffalo area office, for example, has a
15 policy of imposing an 11:00 p.m. curfew on every parolee
16 who is just released from prison, regardless of age or
17 suitability of the curfew. That curfew is left imposed for,
18 I think, a period of three months and then modified in ac-
19 cordance with the discretion of the parole office.

20 Curfews -- I'm not sure if curfews are imposed
21 so routinely in the other area offices, although I do believe
22 that parole officers, individual parole officers impose
23 curfews frequently.

24 Q Could you tell the Court in general, how de-
25 tailed and extensive the restrictions imposed on parolees

2 in New York are as compared to other states in the nation?

3 A Could you repeat that, please?

4 Q Could you tell us how detail-d and extensive
5 the restrictions on parolees in New York are as compared
6 to other states?

7 A The New York parole conditions, I think, are
8 generally considered by commentators and experts in the
9 field as being the most stringent and detailed of any state
10 of any jurisdiction in the country.

11 Q There has been previous testimony that the
12 restrictions imposed by the parole contract lasts as long as
13 the parole does. But could you tell us whether these restric-
14 tions are only theoretical after a certain point in time,
15 whether it becomes, in other words, a paper case of some kind
16 or whether they would have a real impact on the parolee?

17 A I believe that they would always have a very
18 significant impact on the life of a parolee, regardless of
19 the period of time under supervision.

20 The intensity of the supervision will probably
21 lessen over a period of time, that is to say, that a parolee
22 will have to make four reports to the office of the parole
23 officer. He will have to -- and the parole officer would
24 make four visits to his home or to his job.

25 But there never comes a point in time where

2 those contacts diminish all together.

3 They may be reduced every three months but they
4 are nevertheless there, and the parole officer always retains,
5 always has the authority to modify the intensity of the
6 supervision and to make unannounced or surprise visits to
7 your home or employment or the like. So that it never amounts
8 to a paper document.

9 Q In fact, do you know in New York how many
10 parolees are returned for technical violations, approximately?

11 A I believe over a five-year span, it's about
12 40 per cent.

13 Q Would you describe the status of a parolee
14 with respect to such ordinary rights of citizenship as the
15 right to be free from unreasonable search and seizure?

16 A The contract itself or the agreement itself
17 says that a parolee will allow the parole officer or anyone
18 else designated by the commissioner or the Board of Parole,
19 to make searches of his person or his residence, papers
20 and effects, without reasonable cause, consent or a search
21 warrant.

22 So essentially, a parole officer, under the
23 terms of the agreement has the authority to make a search
24 of your home any time of day or night, any day of the week,
25 whether or not you consent and whether or not he had a reason.

2 Q Your report describes extensive disabilities
3 in the area of employment to which parolees are subject.

4 Is there any degree to which parolees are
5 subject to those specifically because of their parole
6 status as opposed to the criminal conviction itself, or does
7 the parole status impose any extra disability as a matter of
8 practice if not law?

9 A I'm not certain about whether or not the
10 disabilities are embodied in any statute or regulation.

11 As a matter of practice, a parolee is subject
12 to more practical disabilities than an ex-offender not
13 under supervision would be.

14 A parolee does have travel restrictions, so
15 for purposes of gaining employment, he may not be permitted
16 to travel as widely as another ex-offender would be in gaining
17 employment.

18 He has to turn to his parole officer for approval
19 to obtain a driver's license or for approval to own a car.
20 The parole officer, for whatever reasons, may say no.
21 These would be additional disabilities that another ex-
22 offender not under supervision would have to experience.

23 Q Would a potential employer or housing authority
24 be more likely to know of the parolee's criminal record than
25 somebody who was not on parole?

2 MR. RYAN: I object to that question.

3 THE COURT: May I hear the question,

4 Mr. Reporter?

5 (Question read.)

6 MS. DU BOIS: I am simply trying to establish
7 there are a number of disabilities, as your Honor well knows,
8 that all persons suffer by virtue of a criminal conviction.

9 Most offenders in New York can escape from these
10 forgetting a certificate of relief, and also simply getting
11 hidden in the world and having the world forget about their
12 prior conviction.

13 I am trying to ask whether, as a practical
14 matter, the fact one is on parole means that people are more
15 likely to know for the rest of your life about your prior
16 record, and therefore that the disabilities that exist as
17 a matter of discretion would be likely to be imposed in
18 fact.

19 THE COURT: What is the objection?

20 MR. RYAN: The question was, as I understood
21 it, your Honor, whether a potential employer or a housing
22 authority would be more likely to know what you are on
23 parole.

24 MS. DUBOIS: I'm sorry, not more likely to
25 know whether you are on parole. More likely to know that you

2 are a person with a criminal record because you are on
3 parole.

4 MR. RYAN: That would be speculation on how
5 the housing authority and how potential employers operate.

6 MS. DU BOIS: I don't believe it is speculation.
7 Mr. Rudenstine: has dealt with a large number of parolees.
8 I think he knows, and we can let him answer whether as a
9 matter of fact, the fact they have to report to their officers
10 makes their parole status something that is hard for them to
11 hide from.

12 THE COURT: Well, he can tell us based on his
13 study of the problem, if he knows, the answer to that.

14 THE WITNESS: The answer is, I believe, that as
15 a practical matter, it is more likely that the housing
16 authority or an employer or any kind of a housing agent
17 would discover your status as an ex-offender if you were
18 on parole than if you were not on parole.

19 The reason is that a parole officer under
20 the New York State Parole Officers Manual is required to
21 make visits to your home and the site of your employment on
22 periodic basis. The frequency of those visits vary, but
23 they never -- but the parole officers manual never authorizes
24 a parole officer to cease from making those visits.

25 So that a parole officer is going to be at the

2 site of your job and at your residence on some kind of a
3 basis and his presence may very well lead to a discovery of
4 the fact you are an ex-offender or currently under supervision

5 THE COURT: Does the application for housing
6 request information regarding any prior conviction?

7 THE WITNESS: New York State Public Housing
8 Authority?

9 I'm not certain of that, but I believe so.
10 In other capacities I have represented people who have had
11 difficulties with the housing authority and your criminal
12 record or whether or not there is anyone in your family
13 currently serving a criminal term or a criminal sentence
14 was material which was sought by the housing authority and
15 considered relevant to whether or not they would approve
16 your application.

17 BY MS. DU BOIS:

18 Q To what extent are the actual restrictions
19 that are imposed on a parolee's freedom determined by the
20 particular parole officer to whom he is assigned?

21 A Each parole officer -- well, the amount of
22 discretion given to a parole officer in enforcing a contract
23 is near total, and he may emphasize some conditions over
24 other conditions. So that there is going to be enormous varia-
25 tion among parolees depending upon their parole officer and

2 their relationship with their parole officer.

3 Enormous variation in the degree to which a
4 parolee is going to experience his freedom being curtailed
5 or restricted.

6 Som parole officers may try to enforce the
7 while agreement most of the time, others may try to enforce
8 only part of it. So there is going to be great fluctuation
9 in the way in which the agreement is enforced and the way in
10 which a parolee is going to experience it.

11 Q And when you say "enforce the agreement,"
12 aren't several of the provisions in the contract, for
13 example, those respecting curfew, abstention from alcohol,
14 residence and employment, aren't they really just requirements
15 that you get parole officer permission?

16 A They are inflexible, if that's what you mean.

17 Q What I mean is that they simply require you to
18 get permission rather than say you can't or can do those
19 things.

20 So the real question is whether or not the parole
21 officer is going to give th permission.

22 A That's correct.

23 Q Is there also provision in the contract for
24 the parole officer to set addition conditions?

A Yes. The last condition, I think, authorizes

2 the parole officer to impose any additional condition
3 he chooses. And he may do so.

4 In fact, parole officers often do so. These
5 additional conditions could be to direct a parolee to not
6 have contact with certain people, to stay away from a parti-
7 cular area, not to get employment in a particular line of
8 work. Special conditions of that nature.

9 Q Are there any limits or guidelines on the
10 setting of those conditions?

11 A None that I'm aware of. Not only is there an
12 absence of written documentation, as far as I know, but there
13 is very little administrative control over the exercise of
14 the discretion by the parole officer.

15 Q There was previous testimony in this case
16 about the process of revocation for technical violations,
17 testimony that technical violations didn't in fact necessarily
18 lead to revocation, that revocation was within the discretion
19 both of the parole officer and of superiors during the
20 review process.

21 Could you comment on that?

22 A Technical violations do not always lead to the
23 recommendation that there be revocation of parole, but they
24 often do. Whether or not they do depends on the parole
25 officer.

2 There is no guidelines as far as I know,
3 which guide the parole officer in exercising his discretion
4 in deciding whether or not to recommend revocation of parole.
5 So whether or not he does or no depending on technical
6 violations that he is confronted with is pretty much his
7 own decision, and he exercises that in a vacuum.

8 Q How controlled is his decision by his
9 superiors and how much impact would his recommendation for
10 revocation have?

11 A Well, he does have to consult with his senior
12 parole officer, I believe, at an early point. Beyond that
13 his recommendation, if it is accepted by the senior parole
14 officer, will lead to the taking into custody of the
15 parolee. There is no bail pending a revocation hearing for
16 a parolee, so at that point a parolee will be imprisoned
17 pending his preliminary investigation hearing or his final
18 hearing.

19 So the impact on the parolee's life will be
20 very substantial once the recommendation for revocation
21 is approved.

22 Q Could you characterize how difficult it would
23 be to comply fully with the parole contract and the conditions
24 of parole?

25 A I think everybody agrees pretty much that we

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Rudenstine - direct

126

talked to during the course of the study, that is, parolees and parole officials alike, that anyone trying to live in accordance with all the conditions that are in effect in New York State would find it impossible over a long period of time.

There are just so many conditions that affect normal life, tht a person is going to be prone to violate some of them now and then. A curfew provision, a geographical restriction provision, sleeping not in your residence on a given night. Any one of a variety of rules and regulations that are embodied here.

Q Finally, Mr. Rudenstine, could you sum up just very briefly, the general conclusions that the Citizens Inquiry came to as a result of its study with respect to the effectiveness of parole supervision, both in terms of rehabilitation and in terms of community protection.

A We concluded that the parole supervision function had essentially two goals in mind, one was to help the offender readjust to society upon release, and the second was to protect the community from crimes that he might commit while he is under supervision.

We concluded that the parole supervision was quite ineffective in achieving either of the two goals. Engineering social rehabilitation seems to be a capacity

2 which is currently beyond us.

3 Regardless of what we do to reduce caseload
4 size or modulate the relationship between a parole officer
5 and parolee. In addition to that the New York State Parole
6 Service has very few resources to really provide concrete
7 help to a parolee.

8 With regard to law enforcement, we found that
9 the ability of the parole officer to predict the likelihood
10 of criminality by a parolee was no greater than that of
11 the Parole Board, which we found to be essentially appallingly
12 bad.

13 So that a parole officer, even though he had
14 some contact with the parolee, was never familiar enough
15 with his life to be able to decide whether or not the person
16 was about to fall into criminal ways, as I believe the
17 statute provides.

18 As a result, many people were not returned to
19 prison who went later on to commit a crime and many people
20 who were returned to prison on technical violations who were
21 though that if they had stayed in the community might commit
22 a crime, we concluded probably would not, based upon the
23 various evidence that we saw.

24 So that by and large we thought that the
25 police function of the parole service was not really advancing

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2 the interests of public safety at all.

3 MS. DU BOIS: Thank you, Mr. Rudenstine.

4 Your Honor, I would just note that
5 Mr. Rudenstine's report, "Prison Without Walls," was submitted
6 to the Court with our brief of May 24th.

7 THE COURT: All right.

8 At this time we will take a 10-minute recess.

9 (Recess.)

10 (In open Court.)

11 CROSS-EXAMINATION

12 BY MR. RYAN:

13 Q Mr. Rudenstine, from what period of time or
14 what period of time was encompassed in your position as
15 director of Citizens Inquiry on Parole and Criminal Justice?

16 A July '72 to March '74.

17 Q And in the course of that period of time of
18 studying parole both at institutions and field parole
19 offices, did you make any separate study of persons on parole
20 who were or had been convicted under the new drug law of
21 the State of New York, the 1973 drug law?

22 A No, we did not.

23 Q Are you familiar with any studies that have
24 been made of those subject persons?

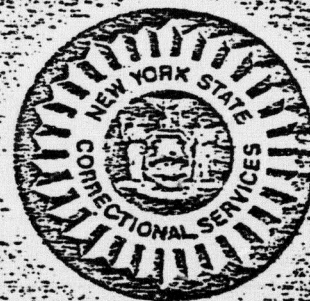
25 A Not the raw materials. Several reports -- I

PETITIONERS!
EXHIBIT 2
75-CW-6219
(CBM)

Annual Statistical Report

1974 Data

INMATE and PAROLE POPULATIONS



STATE OF NEW YORK

DEPARTMENT OF CORRECTIONAL SERVICES

BENJAMIN WARD

COMMISSIONER

DIVISION OF PROGRAM PLANNING, EVALUATION, AND RESEARCH
THE STATE OFFICE BUILDING CAMPUS
ALBANY, N.Y. 12226

OFFENDERS RETURNED FROM PAROLE TO STATE CORRECTIONAL FACILITIES DURING CUMULATING YEARLY PERIODS
SUBSEQUENT TO RELEASE TO PAROLE SUPERVISION IN 1969-1974

TABLE DR-4a. TOTAL RETURNED

		YEAR OF RELEASE					
		1969	1970	1971	1972	1973	1974
Released:	Number	5,719	5,655	5,844	5,855	5,676	5,668
	Percent	100.0	100.0	100.0	100.0	100.0	100.0

Cumulative Number and Percentage Returned

Returned by end of:							
Year of Release	Number	603	643	519	372	331	333
	Percent	10.5	11.4	8.9	6.4	5.8	5.9
1st year after release	Number	1,855	1,701	1,461	1,193	1,199	
	Percent	32.4	30.1	25.0	20.4	21.1	
2nd year after release	Number	2,260	2,086	1,839	1,608		
	Percent	39.5	36.9	31.5	27.5		
3rd year after release	Number	2,366	2,189	1,970			
	Percent	41.4	38.6	33.7			
4th year after release	Number	2,410	2,245				
	Percent	42.3	39.7				
5th year after release	Number	2,437					
	Percent	42.6					

The Association of the Bar of the City of New York
Drug Abuse Council, Inc.

THE EFFECTS OF THE 1973 DRUG LAWS ON THE
NEW YORK STATE COURTS

A Staff Report
of the
Drug Law Evaluation Project
August, 1976

The Effects of the 1973 Drug Laws
on the New York State Courts

INTRODUCTION

Comprehensive revisions of New York State's drug laws became effective on September 1, 1973. The new statutes reclassified many drug crimes as high degree felonies, made prison sentences mandatory upon conviction for many drug crimes, restricted plea bargaining by defendants indicted for drug crimes, and reinstituted recidivist sentencing provisions in New York State. Under these latter provisions, prior felons newly indicted for a felony face new restrictions in plea bargaining, and prison terms must be imposed upon conviction.*

The Association of the Bar of the City of New York and the Drug Abuse Council, Inc. formed the Committee on New York Drug Law Evaluation late in 1973 to evaluate the effects of these revisions. The Committee's staff is addressing a variety of issues raised by the new provisions.

This is a Report of the staff and not of the Committee.

The degree to which the 1973 drug and sentencing laws can be judged successful will depend ultimately on their effects on street crime and drug abuse, effects which can

*The recidivist sentencing provisions are referred to as "predicate felony" provisions in this Report.

occur in two ways. The laws might work to deter would-be drug abusers and other offenders by increasing the risks of committing crimes, an effect sometimes called "general deterrence." The laws could also be effective in reducing drug abuse and other crimes if they resulted in the imprisonment of offenders who would commit additional crimes if allowed to remain at large, a result known as the "incarceration" or "incapacitation" effect, or as "specific deterrence."

Neither deterrence nor incarceration can be expected to operate automatically after a law is enacted. The new laws may or may not prove to be an effective deterrent, but deterrence is not likely to be enhanced unless the likelihood of punishment can be increased. Similarly, incarceration effects cannot be significant until substantial numbers of offenders are actually sentenced to prison.

This report assesses the success achieved by the courts in creating a credible deterrent over the two year period for which data are available. It is concerned primarily with implementation of the statutes dealing with drug offenses -- possession or sale of dangerous drugs. Many of the same issues are relevant to the predicate felony sentencing sections of the 1973 laws. However, sufficient information is not yet available to permit a thorough examination of those provisions.

It is important to stress that whatever the courts are able to do in carrying out the objectives of the laws, they can only provide a limited role in the complicated process of deterrence and incarceration. They cannot, for example,

directly change the would-be drug abuser's perception of how likely he is to be arrested and go to prison, a factor which is crucial to establishing deterrence. To repeat, a final judgement on the effectiveness of these laws must await an evaluation of their effect on drug abuse and drug-related crime. Future reports of the Project will cover both these subjects.

The State's court system is dominated by the concentration of resources in New York City. The 117 criminal term judges operating within the City account for roughly 60% of the State's total superior court resources for criminal cases. The remaining judges are divided among 57 counties, with the heaviest concentrations in Nassau County, adjacent to New York City, and Erie County, which includes the city of Buffalo. The problems faced by judicial administrators in New York City are unique in the State, and a large part of this Report deals with the New York City situation.

Developments in six other counties are summarized to provide a range of experiences which together are probably representative of most court systems in the State.

The findings reported here are based on several sources of information. The Project staff conducted interviews with officials responsible for the administration of the criminal justice system in each county for which data were gathered. Discussions were held with the district attorney or the assistant district attorney responsible for the prosecution of drug cases, with administrative judges, with personnel in public defender offices, and with police officials.

SUMMARY OF FINDINGS

Implementation of the 1973 drug and sentencing laws would be judged successful if: (a) the risk of punishment facing offenders increased to make the deterrent potential of law more powerful; (b) the number of offenders sentenced to prison increased to remove potentially dangerous criminals from society; and (c) the speed with which cases are processed improved so that swiftness of punishment accompanies certainty of punishment.

During the first two years the new drug and sentencing laws were in effect, none of these key indicators of successful implementation have been evident: (a) the risk of punishment facing offenders did not increase noticeably; (b) the number of drug offenders sentenced to prison declined; and (c) the speed with which cases were processed did not improve. Both in 1974 and 1975, there were fewer dispositions, convictions, and prison sentences for drug offenses in New York State superior courts than there were in 1973. However, 1975 was in several respects a more "normal" year than 1974 -- particularly with respect to processing drug cases in New York City -- so that some of the implementation problems may finally have been overcome.

In spite of the slow pace of implementation, over 1000 offenders have been sentenced to indeterminate "lifetime" prison terms for drug felonies in the two years the laws have been in effect, so that a significant number of individual offenders have been affected by the new laws (see Table 2-I).

A total of roughly \$55 million had been spent on court-related resources to implement the laws by the end of 1975.

Credibility of the Deterrent (Section 3)

Increasing the risk of punishment facing offenders

TABLE 2-I

Drug Cases in New York State Superior Courts Before and
After Implementation of the 1973 Drug Laws

	<u>1972</u>	<u>1973</u>	<u>1974</u>	<u>1975***</u>
Indictments	7,528	5,969	6,208	5,340
Dispositions	6,991	5,580*	4,368	4,587
Convictions	6,033	4,739*	3,251	3,095
Prison Sentences	2,039	1,561*	1,074**	1,433
(As a percentage of Convictions)	33.8%	32.9%	33.0%	46.3%
Mandatory "Lifetime" Sentences	N.A.	0	315	817

N.A. = Not applicable

*Estimates by the Drug Law Evaluation Project.

**Of these, an estimated 529 came in new law cases, and
545 in old law cases.

***Full year estimated on the basis of
data for the first nine months.

Source: New York State Division of
Criminal Justice Services

depends on actions of the courts, on the effectiveness of the police, and on the willingness of the public to report crimes. This Report focuses primarily on the role of the courts. A discussion of police policies is contained in Section 5.

Mandatory prison sentences as prescribed in the 1973 drug laws can be imposed only after a conviction in a superior (felony) court. But only about one of every five arrests for drug felonies results in a conviction for a felony in superior court. The role of the courts in sentencing is limited to that small proportion of arrests. And the arrests themselves represent a small share of the drug crimes which are actually committed.

The contribution of the courts in creating a credible deterrent improved sharply in 1975 after having declined during 1974, the first year the new laws were in effect. During 1974, the likelihood of a prison sentence following conviction for a drug crime did not increase above old law levels because it took very long to process the most serious new law drug cases. Last year, however, nearly half the convicted drug offenders were sentenced to prison compared to a third in previous years. There were an estimated 1,433 prison sentences in 1975 compared to less than 1,100 in 1974

But because it took so long to dispose of new law cases, there were still far fewer dispositions of drug cases in 1975 than in 1973, and the rise in the frequency of prison sentences in 1975 still left the total number of prison sentences below the number of sentences imposed

177

in 1973, when an estimated 1,560 defendants went to prison following conviction on old law drug charges. The backlog of drug cases increased during 1975 despite a reduction in the number of new indictments.

The rise in the frequency of prison sentences in 1975 was not enough to make a significant difference in the risk of prison facing offenders committing drug crimes. That risk is still less than one chance in a hundred of receiving a prison sentence from a superior court.

Because of the absolute decline in the number of prison sentences in drug cases during 1974 and 1975 compared to 1973, any beneficial effects the laws might have in terms of crime prevention (through the incarceration of dangerous offenders) have probably not been realized. Sentences imposed on drug offenders have increased in severity. While in 1973 and 1974 old law cases, minimum sentences of over one year were rare -- they applied to between five and ten percent of the cases Statewide -- a third of the new law offenders in 1974 received sentences with minimums of over one year. These sentences are for indeterminate periods, and no reliable information is currently available regarding the length of time those sentenced to prison will actually serve.

Indications are that court systems outside New York City adjusted to the new laws after about one year, and that the New York City courts achieved a balance between indictments and dispositions about two years after the laws became effective. It is estimated that when the difficulties of implementing the new laws are fully overcome, the laws will be responsible for between 500 and 1,000 new prison sentences a year throughout the State.

THE CREDIBILITY OF THE DETERRENT

For laws to become effective deterrents, they must have an effect on the behavior of would-be offenders.

The discussion in this section deals with the potential deterrent power of the laws rather than the result of the behavioral process. Changes in potential deterrence are measured here as changes in the objective probability of punishment, that is the arithmetical ratio of prison sentences to crimes actually committed. The first part of this section presents estimates of the likelihood of a prison sentence (in superior court) following a felony arrest. A subsequent part of the section discusses the likelihood of punishment in terms of actual crimes on the street.

This section does not establish the odds as perceived by the individual criminal but the odds as measured by the aggregate experience of offenders in the judicial system. The effect on behavior will depend on the extent to which aggregate experience influences individual perception. It should be kept in mind throughout the following discussion that the objective of risk of imprisonment is not the same as the perceived risk and may or may not have an independent effect on criminal behavior.* Future work of the Project will attempt to gauge the perception of drug abuse toward

*On all this see the comprehensive work by Franklin Zimring and Gordon J. Hawkins, Deterrence, The Legal Threat in Crime Control. The University of Chicago Press, 1973.

risk of punishment.*

The Results**

Implementation of the 1973 drug laws had not resulted in a measurable increase in the likelihood of punishment for either drug or non-drug offenses by mid-1975. This result is not surprising because even if implementation had been more successful, the potential for increased deterrence may be small because the laws focus on the sentencing stage of the criminal justice process, and few crimes reach this very last stage in the adjudication process.

*Even the connection between perceptions of risk and behavior is not direct. For a single individual, changes in perception do not necessarily imply changes in behavior. For a large group of individuals, changes in behavior are more likely to follow changes in perceptions. It is possible that perceptions of risk might change without any change in the objective likelihood of punishment. A successful advertising campaign may bring about this result.

**Several additional qualifications apply to this formulation. First, these remarks refer only to the "general deterrent" effects that might be expected to affect the population and would-be offenders. The "specific deterrent" effects, resulting from the incarceration of individual offenders, must be examined separately to determine how many crimes may be avoided by incarcerating offenders. Second, this discussion of the likelihood of punishment does not refer to the results of the deterrent process on the prevalence of drug abuse and crime. Rather, changes in the objective probability of punishment measure changes in one input to the deterrent process. Trends in drug abuse and non-drug crimes are being evaluated separately. Third, limitations in the available data restrict the measurement of the true probability of punishment to less-than-perfect approximations (see Appendix II for a description of the information gaps). The most serious piece of missing data is the frequency with which felony arrests lead to a prison sentence in a lower court. Rates of imprisonment in the lower courts may be affected by the new laws if pleas are induced in these courts because the defense doesn't want to risk longer prison terms which would result after conviction in a superior court. The fact that indictment rates in drug cases have not fallen recently suggests that the effect has not been substantial (see Section 5).

The likelihood that a defendant arrested for a drug or non-drug felony would ultimately be convicted and sentenced to prison in a superior court declined during 1974 after having increased between 1970 and 1973. There are indications that the likelihood of a prison sentence had increased again during 1975.

The finding that the risk of punishment (following a felony arrest) was not increased holds both in New York City and, generally, in upstate jurisdictions. Failure to increase the frequency of prison sentences in drug cases during 1974 can be traced to the lack of success in processing class A felony cases, the cases which are subject to the most stringent restrictions on plea bargaining and mandatory sentencing. These difficulties can, in turn, be attributed in large part to a rising demand for trials, which is discussed in Sections 6 and 7. As the following table shows, class A cases were completed in greater number in 1975, and contributed to the increase in the frequency of prison sentences.

Statewide Disposition of Class A Indictments

	<u>All Class A Indictments</u>	<u>All Class A Dispositions</u>	<u>Number of Prison Sentences</u>
1974	3,007	620	325
1975*	2,934	1,694	959

*Full year estimated on the basis of data for first nine months.

Source: Felony Processing Report, New York State Division of Criminal Justice Services.

In New York City, where there are a great many class A cases, these cases contributed most to the buildup in the backlog of drug cases in the Supreme Court. Upstate, where there are relatively few class A cases, the few that do occur are not sufficient to significantly raise the overall rate at which offenders are sent to prison. But, even upstate, the disposition of class A cases lagged behind the disposition of other drug cases in the superior courts.

Estimates of the Likelihood of Punishment*

The likelihood that a defendant arrested for a drug felony would ultimately be sentenced to prison in the superior courts varies between jurisdictions, but most counties experienced increases over the 1970-1973 period (see Table 3-I).

Among the larger jurisdictions (New York City and Erie, Monroe, and Nassau counties), the likelihood of receiving a prison sentence varied widely, between two percent and 16%, but patterns within jurisdictions were fairly clear. Erie County has consistently had the lowest

*The probability of punishment cited here is calculated as the composite of three intermediate probabilities: (1) the likelihood of indictment following a felony arrest; (2) the likelihood of conviction following indictment (conviction to either a felony or a misdemeanor); and (3) the likelihood that a prison sentence will be imposed following conviction (for either a misdemeanor or a felony). These intermediate probabilities were examined to determine how frequently they contributed to changes in the probability of punishment. Each of the three intermediate probabilities contributed to changes in the probability of punishment in about the same number of cases so that in general no one of them was more important than any other.

182

TABLE 3-I

Ratio of Prison Sentences to Arrests:
The Likelihood of Receiving a Prison Sentence
in Superior Court After a Felony Drug Arrest

<u>COUNTY</u>	<u>1970</u>	<u>1971</u>	<u>1972</u>	<u>1973</u>	<u>1974</u>	<u>Jan.-June</u> <u>1975</u>
ALBANY	0.7%	3.1%	4.7%	4.4%	8.0%	N.A.
BROOME	0	4.0	8.9	16.7	7.1	7.9%
DUTCHESS	1.1	5.9	16.9	8.2	5.3	18.1
ERIE	3.8	2.2	2.0	2.6	3.1	N.A.
MONROE	8.7	10.6	5.5	6.4	6.4	N.A.
NASSAU	8.3	16.0	14.4	10.1	6.1	12.0
NEW YORK CITY	8.6	7.6	12.4	12.9	9.6	12.5

TABLE 3-II

Ratio of Prison Sentences to Arrests:
The Likelihood of Receiving a Prison Sentence
in Superior Court After a Non-Drug Felony Arrest

<u>COUNTY</u>	<u>1970</u>	<u>1971</u>	<u>1972</u>	<u>1973</u>	<u>1974</u>	<u>Jan.-June</u> <u>1975</u>
ALBANY	4.7%	5.6%	7.4%	11.1%	8.0%	N.A.
BROOME	7.6	10.4	11.5	16.1	14.3	20.9%
DUTCHESS	7.7	7.3	11.7	13.2	9.6	12.5
ERIE	7.1	5.7	6.4	9.4	8.3	N.A.
MONROE	12.8	11.3	11.6	10.3	11.2	N.A.
NASSAU	11.3	12.0	18.4	23.0	16.6	20.0
NEW YORK CITY	8.3	6.9	8.4	9.3	7.7	9.9

N.A. = Not available

Source: New York State Division
Criminal Justice Services

probability of punishment (between two and four percent); Monroe County is generally in the middle with prison probabilities of between six and eleven percent; Nassau County and New York City exhibit generally higher probabilities of punishment. The three counties in our study with the smallest populations (Albany, Broome, and Dutchess) had too few felony drug arrests to establish a pattern. Many of the extremes in the probability of punishment occurred in these three counties.

Several officials from non-New York City areas remarked to us that they felt the 1973 drug laws were aimed at curbing the lenient judicial policies thought to be prevalent in New York City. Our results show that for drug felony arrests, the likelihood of prison sentence is just as great in New York City as in the other jurisdictions. In 1974, New York City's likelihood of punishment was higher than in any of the other six jurisdictions. In no year for which we have data did New York City rank below third in the likelihood of prison sentence for drug offenses.

Four of the seven jurisdictions (including New York City) showed decreases in the probability of punishment for a drug felony during 1974; in a fifth (Monroe County) there was no change; and two counties (Albany and Erie) experienced increases (See Table 3-I). All four of the jurisdictions for which we have data covering the first half of 1975 showed increases above 1974 in the likelihood of a prison sentence after a felony drug arrest. It now appears that 1974 was a year of transition to the new

laws, with a major interruption in the flow of cases traceable to difficulties in processing class A cases. A return to more normal patterns of disposition and sentencing was evident in 1975.

Between 1970 and 1973 there was a definite trend toward an increase in the probability of punishment for non-drug felonies. Only Monroe County did not exhibit this upward trend, and there the risk of a prison sentence was virtually constant (see Table 3-II).

Since 1970, Nassau County has shown the highest probability of punishment for non-drug felonies.* Broome County had the steadiest increase in the probability of punishment with increases from 8% in 1970 to 21% in the first half of 1975.

New York City's ranking has not been as high for non-drug offenses as it has been for drug crimes, with the likelihood of punishment falling generally in the lower tier among the counties. In contrast to its high ranking during 1974 for drug crimes, the probability of a prison term following a non-drug arrest in New York City was the lowest of any of the seven jurisdictions (about eight percent), but only imperceptibly lower than in Albany and Erie counties. Albany and Erie counties showed

*But Nassau also had a high proportion of misdemeanor convictions in superior court. See "A Cross-County Comparison of Court Resources," below.

lower probabilities than New York City between 1970 and 1972, but caught up with the City's rate of punishment in both 1973 and 1974.

In New York City since 1970, drug offenders received prison sentences more frequently than non-drug offenders. Just the opposite is true in each of the six counties outside the City. We can speculate that the contrast is due to the relatively serious nature of drug offenses which come to the attention of the courts in the City, i.e. offenses involving heroin where the likelihood of non-drug criminal activity of the defendant is thought to be high.

Six of the seven jurisdictions experienced a break in the upward trend toward imprisonment in 1974, as the likelihood of punishment for non-drug felonies declined (Monroe County was again stable). However, all four jurisdictions for which data are available for the first half of 1975 (New York City and three other counties) experienced a resumption of the earlier trend, with the City and Broome County reaching new highs.

Each of the upturns in the first half of 1975 was accompanied by increases in the frequency with which convicted defendants were sentenced to prison.

The Potential in the New Laws for Raising the Risk to Offenders is Limited

Even if the new laws could have been implemented quickly without delays and higher backlogs (both of these trends are documented in following sections), the chance of increasing the deterrent power already present in existing law would be limited because of the very small risk presently facing those engaged in crime.

In contrast to the estimates of punishment probabilities cited above, which use felony arrests as a base, the discussion in this sub-section deals with the likelihood of punishment following an actual crime.

Typically, the number of offenders convicted (either by trial or plea) in superior courts account for only 15-20% of defendants arrests for felonies. The reduction occurs because most arrests do not result in indictments, and a significant proportion of those that do lead to indictments result in acquittals or dismissals (see Chart 3-A).

Compound this dilution in the courts with the facts that (1) only 20% of all complaints to the police lead to an arrest (a typical arrest rate both in New York City and elsewhere in the county), and that (2) citizens only report half the crimes (with victims) that really occur,* and it is striking what a small number of felonies eventually lead to a conviction in superior court.** The final tally

*U.S. Department of Justice, Law Enforcement Assistance Administration, Criminal Victimization Surveys in the Nation's Five Largest Cities. (Washington, D.C.: 1975), pp. 61, 62.

**These figures are for non-drug felonies in New York City, where data exists for complaints and for criminal victimizations. The values might vary from place to place, but probably not enough to change the conclusion that the risk facing an offender is low.

157

181

The Gradual Reduction in the Risk of Imprisonment

Non-Drug Felonies

All non-drug felonies	100%				
Felonies reported to the police	x				
	50%	=	50%		
Arrests for known felonies	x				
	20%	=	10%		
Indictments following arrest	x				
	25%	=	2.5%		
Convictions in superior court	x				
	60%	=	1.5%		
Prison sentences after conviction	x				
	60%	=	0.9%		

Drug Felonies

All drug felonies	100%				
Felonies reported to the police	x				
	1%	=	1%		
Arrests for known drug felonies	x				
	40%	=	0.4%		
Indictments following arrest	x				
	35%	=	0.14%		
Convictions in superior court	x				
	60%	=	0.08%		
Prison sentences after conviction	x				
	60%	=	0.05%		

Source: Estimates by the Drug Law Evaluation Project based on 1975 data for New York City.

comes to 1.5-2% of non-drug felonies actually committed.

(Some felony arrests lead to a prison term in a lower court after the charge has been reduced to a misdemeanor, i.e. prior to indictment. We estimate that these prison sentences add roughly 0.5% to the 1.5-2% range cited here.) A comparable figure for drug felonies would be much lower because so few drug crimes are reported to the police. Use of official statistics on complaints to the police of drug offenses would severely understate the true prevalence of drug crimes.* Laws dealing with mandatory sentencing in the superior courts can only operate on this two percent of crimes.

Nothing in this study addresses the question of the deterrent effect of the old drug law, or, for that matter, of any other section of the Penal Law which did not change. A very low risk of punishment may be sufficient to deter most would-be offenders. The question at issue is whether the change in risk is effective in deterring additional would-be offenders.

Changes in the risk of engaging in crime depend on changes in what is now a two percent likelihood of being sent to prison as a result of committing a crime.

Approximately one-third of those convicted in the superior courts of the State in 1972, 1973 and 1974 were sentenced to prison under the old drug laws. These prison terms represent far less than one percent of drug crimes which are actually committed.

* A subsequent report of the Project will examine changes in the prevalence of heroin abuse, which with some caution, can be used as a proxy for movements in the most serious drug crimes.

Eliminating all discretion from the sentencing process, and imposing prison terms after every conviction, would change the cost of conviction substantially (from less than a 50% chance of prison to 100%), but the risk involved in committing a crime would only be changed from the one percent it is today to two percent.

We project that when backlogs have stabilized, i.e. when class A dispositions occur with the same regularity as class A indictments, approximately 60% of all superior court drug convictions will result in prison terms. Under the old laws, roughly a third of convictions resulted in prison sentences. (The Project's survey of sentences showed that because class A cases lagged during 1974, the rate of prison sentences did not increase during the first year the new laws were in effect.)

Once stability has been achieved, we expect the new drug provisions to have resulted in an increase in the likelihood of punishment (the ratio of prison sentences to crimes actually committed) of one percent or less.

It is possible that even this small change in risk will have some effect on deterrence. For example, the change in risk might be perceived as large because it is concentrated at one point in the judicial process, i.e. after conviction. The odds of punishment facing the relatively few who get that far through the system have gone up substantially. On the other hand, conviction is the point in the process furthest removed from commission of the crime. From this point of view, a given increase in the risk of punishment might be most effective if concentrated at the arrest stage rather than the conviction stage.

190

Several police officials, both within and outside New York City, informed us that they noted a retrenchment of street level drug dealing just before and soon after the new laws became effective. The officials attributed this caution to uncertainty among dealers over the police response to the laws. These same officials believe that the retrenchment was only temporary. When dealers noticed no change in police behavior, they say, business picked up once again, although it is felt that, in general, more caution is exercised in street level dealing than before the new laws became effective. (The data presented in Chart 5-A, which shows a uniform downturn in arrests during 1973, are consistent with this view. See Section 5, page 11.)

We do not have enough information yet to project the comparable change in the probability of punishment for non-drug crimes. Some increase is expected to result from implementation of the predicate felony provisions, but it is not likely to be greater than the change we expect to see for drug offenses.

To repeat, these conclusions refer only to the potential in the laws for general deterrence, and not for crime prevention as a result of incarceration. If their potential as an enhanced deterrent is as limited as suggested here, the benefits they can have as crime control measures must depend on incarceration effects.*

*Late in 1975, staff of the Drug Law Evaluation Project conducted a survey of convictions and sentences in 1974 new law drug cases. Results regarding prior criminal history and age of defendants were compared to offenders convicted and sentenced under the old drug laws in 1972 and 1973. The results of the survey are fully described in Convictions and Sentences Under the 1973 New York State Drug and Sentencing Laws: Drug Offenses, A Staff Report of the Drug Law Evaluation Project December 1975

Potential Number of New Prison Sentences

The defendants in cases which reach the sentencing stage account for a greater (though unknown) proportion of the crimes actually committed than the two percent figure discussed above suggests. Thus a policy of incarceration should have a somewhat greater effect on crime on the streets.

The two percent risk of imprisonment may be thought of as the potential cost facing a would-be offender in committing a single crime. For an offender who commits many crimes, the two percent figure is the risk he faces in committing his next crime. However, if he were to commit ten crimes he would face a two percent risk of imprisonment for each crime, and his risk of imprisonment is much higher than the objective odds facing one-time offenders.

The relatively high risk of imprisonment for multiple offenders is the basis for the contention that many recidivists eventually find themselves before the bench. A policy of imprisonment, then, has potentially significant effects on the incidence of crime on the streets simply because recidivists are isolated from society.

The extent of the effects of incarceration depends on the frequency of crimes committed by criminals and the length of the criminal "career" in addition to the likelihood of punishment.* These factors are being explored by Project staff.

*See, for example, Shlomo Shinnar and Reuel Shinnar "The Effects of the Criminal Justice System on the Control of Crime: A Quantitative Approach," in Law and Society, Summer, 1975.

It is clear, though, that in the absence of reliable predictions of future behavior by offenders, there will be no increase in the effectiveness of prison as a preventer of crime unless there is an increase in the number of offenders in prison (or a rise in the length of time offenders spend in prison).

We estimate that even with full implementation -- once there are proportionately as many dispositions of class A cases as there are indictments -- the number of newly imposed prison sentences will be surprisingly small. Based on the frequency of prison sentences in 1974 and 1975, and on the distribution of cases between class A felonies and other drug cases, it is likely that only 600 new drug felony offenders a year will face prison sentences as a result of the new laws, once full implementation has been achieved.

This estimate is based on the projection that 60 of every 100 drug convictions will eventually result in a prison term.* (In 1974, the comparable figure was 33% and in 1975 it was 46%.) In New York City, because of a much higher proportion of class A cases, the prison rate is likely to reach 75% of all drug convictions.

Table 3-III summarizes recent history and presents three alternate projections for the future.

*Statewide in 1974 and 1975, roughly 50% of drug indictments were for class A felonies. Fully 90% of convictions for class A felonies resulted in a prison sentence. Only 20% of non-class A convictions resulted in prison terms. Therefore $(.5)(.9) + (.5)(.2) = .55$. The table in the text conservatively rounds upward to .60.

Table 3-III

Number of Prison Sentences Likely to Result from Full Implementation of the 1973 Drug Laws

YEAR	Superior Court Drug Convictions		Frequency of Prison Sentence After Conviction		Number of Prison Sentences	
	N.Y.S.	N.Y.C.	N.Y.S.	N.Y.C.	N.Y.S.	N.Y.C.
1973	4,739	2,703	32.9%	41.4%	1,561	1,118
1974	3,251	1,673	33.0%	45.6%	1,074	762
1975	3,095	1,652	46.3%	59.0%	1,433	974
Future I	3,000	1,500	60.0%	75.0%	1,800	1,125
Future II	3,500	1,750	60.0%	75.0%	2,100	1,312
Future III	4,000	2,000	60.0%	75.0%	2,400	1,500

Sources: New York State Division of Criminal Justice Services; and estimates by the Drug Law Evaluation Project.

Recently, statewide drug indictments have been running between 5,000 and 6,000 per year, and convictions between 3,000 and 5,000 per year. In New York City, drug indictments have been about 3,000 a year for the last three years, and they have led to between 1,500 and 2,000 convictions. The larger number of convictions in 1973 is the result of cases which originated under the City's mass arrest policy and which were still being disposed of.

If we assume that recent indictment and conviction rates will prevail in the near future, and that the frequency of prison sentences rises to expected levels (60% of convictions across the State and 75% of convictions in New York City), between 1,800 and 2,400 prison terms will result from drug convictions statewide. Taking the midpoint (Future II in Table 3-III) as the most likely estimate, the 2,100 prison sentences in statewide drug cases represents an increase of only 600 sentences above the 1,561 sentences under the old laws in 1973.

Direct costs of the new courts and associated personnel furnished to implement the 1973 laws are currently running at \$40 million a year. Since mid-1975 those courts have handled both new law and other cases*, and their value must be put in terms broader than the number of prison sentences they produce.

*See Section 6, p. 23.

But as a crude gauge of their value, assume their existence results in another 400 prison sentences a year statewide, above the 600 new sentences they might produce in drug cases. The \$40 million expenditure* would then result in 1,000 new prison sentences (which would not have occurred under the old laws), or an extraordinary cost of \$40,000 for each new prison sentence. To the extent that offenders are likely to be responsible for numerous crimes, the cost per crime avoided or postponed by incarceration is reduced. The higher the recidivism rate, and the more crimes committed by offenders, the greater are the benefits of incarceration, for a given cost.

This reference to the cost of additional prison sentences is not meant to imply that prison sentences are the only product of the courts. If the new courts furnished to implement the 1973 laws also produced dispositions in non-new law cases which would not have been produced in their absence, they would be contributing to a reduction in the overall backlog of the courts, and generate another benefit to be weighed against the costs of implementation. The courts furnished to deal with the new laws do produce some dispositions in non-new law cases. However, the 1973 laws are not in themselves expected to have an impact on total dispositions while they were intended to result in additional prison terms.

*The estimate is crude because the \$40 million includes the cost of that portion of the newly furnished resources which are devoted to non-new law cases.

SPEED OF JUSTICE

The speed with which indictments are processed is an issue of central importance in evaluating the impact of the new drug laws on the administration of justice. Changes in the age of cases in the criminal justice system serve as one measurement of the ability of the courts to efficiently handle the change in workload caused by new law cases. In addition, while there is no empirical evidence we know of that correlates the speed of disposition with effective and credible deterrence, that relationship is intuitively attractive and is often mentioned in the literature.

Although the present data are not conclusive, they do suggest that the length of time required to process a drug indictment in upstate counties has not been seriously affected by the new drug and sentencing laws. However, drug cases in New York City do seem to be facing considerably longer delays than was the rule prior to the implementation of the new laws. These judgments are based on an analysis of the change in backlog in the

*See, for example, Herbert L. Packer, The Limits of the Criminal Sanction. Stanford University Press, 1973, p. 159; and The President's Commission on Law Enforcement and Administration of Justice, Task Force on the Administration of Justice, Task Force Report: The Courts. U.S. Government Printing Office, 1967, pp. 80-91.

superior courts of the State, and the length of time between indictment and disposition for cases which were actually disposed of.*

The New York City Supreme Courts experienced a steady increase in the backlog of new law drug indictments from the time the laws were passed through the fall of 1975. By the end of December, 1975, 2,500 new law drug cases were pending in the New York City Supreme Courts. This backlog amounted to the equivalent of ten months worth of drug indictments.

An increase in the backlog would not in itself be a cause for alarm if resources could be expanded enough to hold delays constant. For example, if the pending caseload rose by 1,000 cases, but new court personnel were available to process those cases in a reasonable amount of time, the delay between indictment and disposition might not change at all.

There is no indication, however, that the additional resources furnished in New York City were sufficient to avoid a rise in court delays. During the first two years under the new drug laws, the time it took to dispose of

*The length of time that disposed cases had been pending in the superior courts does not give a true indication of the actual court delay. For example, if only cases that are easy to process are disposed of, the time to disposition for those cases might be quite low. However, the age of the cases awaiting disposition might be going up at the same time. In order to judge the true direction of changes in the speed of justice, we would need to know the age of pending cases as well as of disposed cases. Unfortunately, only data on the latter are available.

new law drug cases increased steadily, from an average of roughly six months in the third quarter of 1974 to eight months in the third quarter of 1975.

The combination of increasing backlogs and increasing age of cases which did complete the process is evidence that the age of the pending caseload had increased as well in New York City. No accurate estimate can be made of the extent of the increase, but an increase of about 45 days in the median age of the pending caseload would not be inconsistent with the available data.*

In upstate counties, there was an unavoidable increase in the pending new law drug caseload during 1974. There is always some minimum time required to process a case, and as there were virtually no new law cases pending before 1974, some growth of the pending caseload was inevitable. However, in contrast to the New York City experience, the backlog of new law indictments upstate stabilized during 1975. In these counties, the median time to disposition is between 90 and 120 days compared to the City's 240 days, and has not changed since the last quarter of 1974. It appears, therefore, that upstate areas have been able to stabilize the disposition process for drug cases at half the time it takes to dispose of new law cases in

* The calculation assumes a first-in, first-out processing system and an even flow of indictments. In 1973, the median age of disposed cases was 150 days, from which we assume that the median age of pending cases was 75 days. Corresponding figures for the first three quarters of 1975 were 245 days for disposed cases, and 122 days for pending cases. The difference is 122 minus 75, or 47 days.

the City. The stability in both the size of the backlog and in the time it has taken to process cases in the past implies that there has also been stability in the age of the pending caseload.

We think that a large part of the increase in court delays in the City can be attributed to the plea bargaining and sentencing restrictions imposed by the new drug laws. The causality is somewhat ambiguous because there is no pre-law non-drug information available to compare to non-drug data for 1974 and 1975. Without such information, we do not know for certain that the rise in drug case delays are not matched by greater delays in non-drug cases.

The best evidence for attributing the rising delays to new drug cases is that it is the prevalence of class A felony cases which seems to make the difference between success and failure in coping with the new laws. The high proportion of class A felony indictments pending in New York City is evidence that class A cases have been much more difficult to process than other drug cases. Class A cases comprise over 90% of the pending new law caseload in New York City, a higher percentage than their share of indictments (75%).

Latest available data show that half the class A felonies are over eight months old at time of disposition, but other new law drug cases are only about five months old. Since the backlog of drug cases in New York City

is dominated by A felonies and these cases have already been awaiting disposition longer than other cases, the processing time of the new drug cases is likely to increase for some time to come.

The relative speed with which new law cases are processed in upstate counties is partly attributable to a lower percentage of class A felonies than is evident in the City. As the data for the City indicated, disposition data for upstate show that class A felonies tend to have been in the courts about two months longer than less serious drug indictments. However, both class A felonies and other new drug cases appear to be processed more quickly in upstate counties, with times to disposition running between two and three months less than in the City. Unless there is an increase in the frequency of class A cases outside the City, processing times should remain in the three to four month range.

THE EFFECTS OF THE NEW LAWS ON THE NEW YORK CITY SUPREME COURTS

Before describing the recent performance of the New York City superior courts, a few words about the organization and the remarkable growth of the City's court system are in order. Rapid expansion has added to the difficult job of managing this very large and complex institution.

The City's superior criminal court -- the Criminal Term of the Supreme Court -- is centrally administered, but is divided jurisdictionally into five separate counties. Prosecution in each of the county branches of the Supreme Court is the responsibility of the District Attorney, who is separately elected in each county.

The system itself has grown enormously since 1972. In the beginning of that year, there were 50 courtrooms (known as "parts") operating in the City as the regular operation of the Court. The first sizeable expansion occurred during 1972 with the inception of the federally funded Special Narcotics Court Program (SNCP). The SNCP added 12 new parts to the system during 1972, and all 12 are still in operation (7 in Manhattan, 2 in Brooklyn, 2 in the Bronx and 1 in Queens). Under the SNCP a special Assistant District Attorney for Narcotics Prosecution is appointed by agreement of the City's five district attorneys and is responsible for the prosecution of about half of the City's drug cases.

Also in 1972, the City and State combined to finance the addition of 13 new parts under the Emergency Felony Case

Processing Program (EFCP). These parts became a portion of the system's regular organization, and were intended for the general purpose of reducing backlogs, which had grown substantially between 1970 and 1972 (See Table 6-I).

An additional two parts were furnished under EFCP in 1973.

Finally, in late 1973 and 1974, as a direct result of the 1973 drug and sentencing laws, 31 additional parts were added to the City's Supreme Court system. The formal name for these parts is the Emergency Dangerous Drug Control Program (EDDCP). Nine of the parts were established in Manhattan and were combined organizationally with the seven parts created earlier under the SNCP. Brooklyn received 11 of the new parts, the Bronx received eight, and three of the new parts were assigned to Queens.

Thus, by a series of steps, the already large criminal term of the New York City Supreme Courts more than doubled in size over the short period of three years. Currently, the system operates with a complement of 117 full-time criminal term parts.

For the purpose of processing cases, the Supreme Court is organized into a three tier system which distinguishes it from the "individual calendar" (or IC) system prevalent in many upstate counties. Under an IC system of court organization, one judge follows a case from beginning to end. In the New York City scheme, however, arraignments are handled in a specialized part or parts in each county, and cases are then assigned to pre-trial conference parts -- all-purpose parts -- where they remain until they are ready for trial.

TABLE 6-I

The Changing Backlog in the New York City Supreme
Courts (Drug and Other Cases Combined)

<u>YEAR</u>	<u>Indictments</u>	<u>Dispositions</u>	<u>Change in Backlog</u>
1970	20,001	17,463	+2,538
1971	27,308	21,281	+6,027
1972	27,114*	21,873	+5,241
1973	22,458*	24,630	-2,172
1974	20,686	19,685	+1,001
1975	19,720	21,938	-2,218

*Data on indictments not available. Number
of arraignments used here.

Source: Management Planning Unit, Office of Court
Administration, New York State. Derived
from JC-153 forms.

Trials generally take place in specialized trial parts. Each of the four large counties contains one or two arraignment parts* and varying numbers of conference and trial parts. Individual cases and justices are assigned to particular parts. In an IC system, cases are assigned to individual justices. Assignments of justices to specific parts may be changed monthly, but they often remain the same for months at a time.

There is some specialization among parts with respect to the kinds of cases which are assigned to them. The 12 parts created and federally funded under the Special Narcotics Court Program handle drug cases exclusively. The parts created through the Emergency Dangerous Drug Control Program handled drug and predicate felony cases almost exclusively until recently when they began to take on other cases.** Some counties have established parts to specialize in homicide cases or other major felony offenses.

The Court's expansion between 1972 and 1975 took place at a time when indictments had been declining from a peak reached in 1971, and has contributed to the success of the criminal term in achieving a balance between dispositions and indictments in non-drug cases, so that the tremendous growth of backlog experienced in the 1970-1972 period has stopped and has begun to be reversed (See Table 6-I). The reversal has been noteworthy because the trial rate had

* Manhattan and Bronx counties have two arraignment parts each, while Kings and Queens Counties have one arraignment part each.

** See p. 23 of this Section for some additional detail.

almost doubled between 1973 and 1975. Trials absorb much more court time than other dispositions and thus are particularly expensive to the system. Our estimates indicate that every time the citywide trial rate increases by one percentage point (for drug and other cases combined), nine additional full-time court parts would be required annually to keep the number of dispositions constant. Although the backlog of non-drug cases in New York City stopped growing in 1973, the pending drug caseload grew for two full years following the effective date of the new drug laws despite the 31 additional court parts added under the Emergency Dangerous Drug Control Program.

The prime reason for the continuing growth of the drug case backlog has been the slowness with which class A felony cases generated by the 1973 drug law have moved through the system. As a substantial number of these cases finally reached disposition late in 1975, the backlog growth decelerated. By the fourth quarter of 1975, the drug case backlog had begun to decline slightly.

The Importance of Class A Cases in the Supreme Court Workload, Sept. 1, 1973 - Dec. 31, 1975

<u>Case Type</u>	<u>Indictments</u>	<u>Disposi- tions</u>	<u>Rise in Backlog</u>	<u>Contribution to Backlog</u>
Class A Drug Felonies	4,197	2,002	2,064	82%
Other New Law Drug Felonies	1,325	1,004	352	18%
Total New Law Drug Felonies	5,522	3,006	2,516	100%

Source: Estimate based on data from the Management Planning Unit, Office of Court Administration and New York State Division of Criminal Justice Services, Form D. See Table 6-II for computation method.

Growth of the Drug Case Backlog

Table 6-I gives an indication of the growth of the backlogs (both drug and other) which led to the expansion of the Supreme Court.* Indictments -- the input to the Supreme Courts -- jumped 35% (from 20,000 to 27,000) in one year between 1970 and 1971, an increase which could not possibly be matched by dispositions. Indictments remained stable during 1972, and declined sharply in 1973.

According to this set of estimates, backlogs rose by 20% of indictments in both 1971 and 1972 and had grown by nearly 14,000 cases between 1970 and 1972. It is useful to look at pending caseloads in terms of the number of months they represent for the workload of the courts. By this measure, the backlog grew by an equivalent of nearly eight months' worth of dispositions between 1970 and 1972.** This was an emergency by anyone's definition.

Drug cases made a heavy contribution to the backlog in 1970, which was the peak year for felony drug arrests under the Police Department's mass arrest policy. The 26,000

*There is a confusing array of figures available to measure the courts' workload, all produced by official sources. Appendix III presents a discussion of the various estimates. The ones used here produce conservative estimates of increases in the backlog for 1970, 1971, 1972 compared to the figures from other sources. Estimates of reductions in backlogs during 1973, 1974 and 1975 are greater than those from other sources. In each year, then, these estimates provide the most favorable view of the courts' activities.

** $14,000 \text{ (growth of backlog)} \div 22,000 \text{ dispositions in 1972} \times 12 \text{ (months per year)}.$

felony drug arrests resulted in over 7,000 indictments, of which over 1,500 remained pending at the end of the year. (See Table 6-II. The qualifications to the estimates in Table 6-I also apply to Table 6-II.)

Old law drug cases also contributed in a small way to the 1971 growth in the City's pending caseload (500 out of the 6,000 case increase were drug cases). By 1972, the backlog of drug cases seems to have stabilized, and 1972 and 1973 saw very small declines. Changes of this magnitude (200 to 300 cases per year) are negligible enough in terms of the total workload to be ignored. The measures themselves are not accurate enough to reflect changes of these small amounts.

In 1974, when the new law drug cases began to appear in large number, most of these cases remained pending at year's end. Only about 750 new law drug cases were disposed of in 1974 compared to about 2,650 total drug dispositions.

In the normal course of events, some buildup in backlog would be expected to occur. Cases cannot be disposed of instantaneously. If it takes a minimum of, say, three months to completely process a case, then a pending caseload of three months' worth of indictments would be normal. But by the end of 1974, the 2,000 pending new law cases already amounted to eight months' worth of indictments. There can be no doubt that a pending caseload of that size exceeds the magnitude explainable by what should be the minimum processing time.

More serious is the fact that the size of the pending caseload grew steadily, though more slowly, during the first nine months of 1975. Other counties in the State also saw

TABLE 6-II
Changes in the Backlog of Drug Cases in
the New York City Supreme Courts

<u>YEAR</u>	<u>Indictments</u>	<u>Dispositions</u>	<u>Change in Backlog</u>
1970	7,381	5,761	+1,620
1971	6,638	6,131	+ 507
1972	4,086	4,300	- 214
1973	3,312	3,358	- 46
1974	3,278	2,366	+ 912
1975	2,855	2,739	+ 116
<u>New Law Only</u>			
1973	199	6	+ 193
1974	2,654	769	+1,885
1975	2,669	2,231	+ 438

Sources: Management Planning Unit, Office of Court Administration, New York State, JC-153 forms; and New York State Division of Criminal Justice Services, Form D.

Data from Form D, Division of Criminal Justice Services, are used to determine the proportion of indictments and dispositions accounted for by drug charges in each year. These proportions were applied to the total number of indictments and dispositions reported by the Office of Court Administration, which issues a more accurate count of total court actions, but does not isolate drug charges.

some buildup of their new law drug caseload during 1974, but by early 1975, those backlogs were already being reduced. (See discussion in Section 7.) It wasn't until the fourth quarter of 1975 that the New York City backlog was reduced. Even then the reduction was less than 100 cases from what had become a backlog of over 2,500 cases.

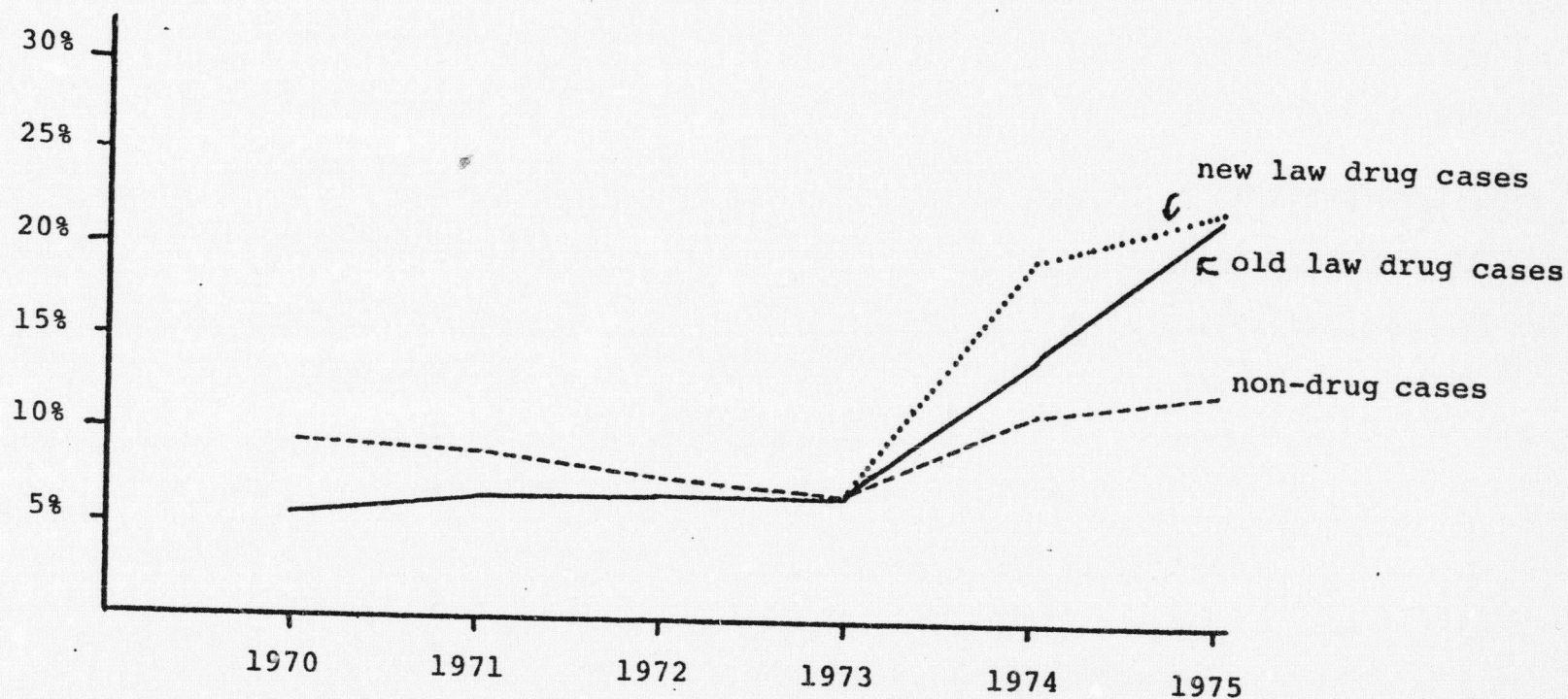
The 1974 and 1975 growth of the new law case backlog came at a time when the courts were reducing the pending caseloads of non-drug indictments. The backlog of indictments other than new law drug cases fell by 900 in 1974, and by an additional 2,700 in 1975.

The new law backlog would have grown even more had it not been for a sharp rise in the frequency of dismissals in drug cases (See Chart 6-A). We questioned several prosecutors about the reasons for the substantial increase in dismissals in 1974. They believe that the rise could be explained by the consolidation of indictments (and superceding indictments) facing individual defendants. Typically, if a defendant has more than one indictment pending, prosecutors might settle for a plea to one of the indictments in exchange for dismissing the others. This is itself a kind of plea-bargaining.

There is no evidence available on the number of dismissals which occurred as a result of consolidation under the old laws, but we doubt the prosecutor's explanation. There is no reason to believe that the frequency of consolidations should increase so strikingly between 1973 and 1974. The new laws do not permit the dismissal of class A drug cases in satisfaction of other indictments. Rather than explaining

New York City: Cases Disposed by Dismissal As A Percent of Total Dispositions in the Supreme Courts

PERCENT
OF TOTAL
DISPOSITIONS



Source: New York State Division of Criminal Justice Services

the rise in dismissals as a result of consolidations, the increase appears to be a natural response to the pressures of an ever-increasing backlog.

We do not yet know whether the increase in dismissals of non-drug cases during 1974 and 1975 support this suggestion (See Chart 6-A). If the increase in dismissals in non-drug cases was concentrated among predicate felony cases (which were processed in the same courts as the new drug cases), that would support the hypothesis that dismissals have increased in response to backlog growth. More evidence on this point will be forthcoming when the Project examines the disposition process for predicate felony cases later this year.

The Role of the Demand for Trials

The State-financed addition of court resources was furnished in response to predictions by judges and others that the plea bargaining restrictions and mandatory sentencing provisions in the new laws would leave very little incentive for defendants to plead guilty. Instead, defendants were expected to carry their cases to trial in large numbers.*

They have. There were 335 trials of new law cases during 1975, compared to 218 trials of old law drug cases during 1973, the last (nearly) full year of dispositions under the old laws. There were 20% fewer dispositions of drug cases in 1975 compared to 1973 (2,750 compared to 3,350). Thus the trials accounted for a much larger share

*The following subsection presents some estimates of the effect of increasing trials on the productivity of the courts.

of the courts' drug case workload in 1975 than it did in 1973. The trial rates are shown in Chart 6-B, which indicates that the rate climbed from 6.5% of dispositions in 1973 to 15.0% of new law dispositions in 1974 and 1975.

A tendency toward increasing trial activity predated the effective date of the new laws, so some of the increase during the past two years might have occurred even under the old laws. But there is an unmistakable acceleration evident in 1974, which seems clearly related to the effects of the 1973 laws.

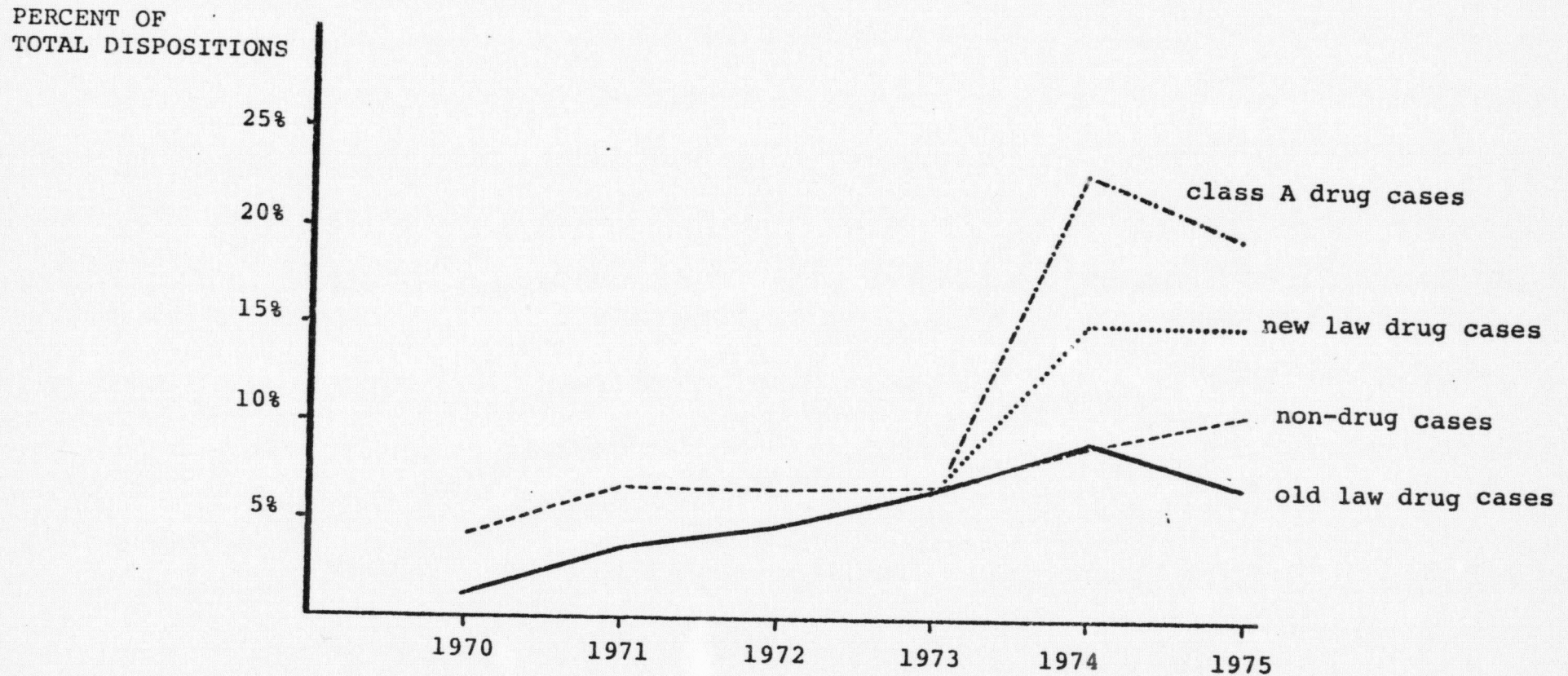
This conclusion is strengthened by the fact that in class A cases -- those cases which face the most severe restrictions in plea bargaining and sentencing -- the trial rate was higher than in other new law cases (See Chart 6-B).

The frequency of trials in non-drug cases also increased faster in 1974 and 1975 than would have been expected on the basis of past experience. In these cases, trials grew from 6.6% of dispositions in 1973, to 8.7% in 1974, and further to 10.1% in 1975. While these increases are smaller than the increases seen in drug cases, they do suggest an accelerated inclination toward trials beginning in 1974.

Some part of this growth may be attributable to the plea bargaining restrictions and mandatory prison sentences which the 1973 laws placed on second felony offenders -- the so-called predicate felony provisions. Judge David Ross, the City's Administrative Judge, believes that these restrictions have had much the same effect on non-drug trials as the class A drug provisions have had on drug trials. Faced

C H A R T 6-B

New York City: Cases Disposed By Trial As Percent of
Total Dispositions ("Trial Rate") in the Supreme Courts



Source: New York State Division of Criminal Justice Services

214

with certain imprisonment upon any plea to a felony, defendants, it can be argued, will choose to go to trial. This view has been supported by staff of the Legal Aid Society, which represents most indigent defendants in New York City.

The incentive to go to trial in these cases is not universal, however. A defendant facing a class C charge, for example, might be faced with the following options:

(1) go to trial on the class C charge; if found guilty, receive a minimum sentence as a prior felon of three years (but the minimum sentence could be as high as $7\frac{1}{2}$ years); or
(2) plead guilty to a class E felony and receive a minimum sentence of $1\frac{1}{2}$ years. Some defendants will take a chance on a trial, while others will take the sure thing by pleading, even though they must go to prison. Some officials outside the City believe that, on balance, most of their defendants prefer the sure thing.* A firm answer on the choices defendants make between trials and pleas will have to await the Project's analysis of the disposition process for predicate felony cases.

The following section presents some additional explanations for the failure of the City system to keep up with the demands the 1973 laws have placed upon it.

*Even the results of a plea are not always certain. It is only after the minimum term has been served that the Parole Board considers release of the defendant. The offender could serve as long as twice the minimum term set by the court.

STATE OF NEW YORK — DEPARTMENT OF CORRECTIONAL SERVICES
 CERTIFICATE OF RELEASE ON PAROLE

PETITIONER
 EXHIBIT 9
 75-6214
 (C1311)

SENTENCE

INDETERMINATE

REFORMATORY

NYSID No:

now confined in

was convicted of
 adjudicated to be

and sentenced in the county of

at a term of the

Court, Judge

presiding on the

day of

19

and received at

on the

day of

19

for the term of

the maximum term of which sentence expires on the

day of

19

has agreed to lead an honest and upright life and abide by the rules to which (he) (she) has signed (his) (her) name here below, and is hereby granted parole by the Board of Parole, by virtue of the authority conferred by law upon said board.

It is therefore directed that (he) (she) be released and placed under the jurisdiction of said Board of Parole until the expiration of the maximum term.

Signed this day of

19

at

Date of Parole:

Board of Parole:

I, in consideration of being granted release, promise, with full knowledge that failure to keep such promise may result in the revocation of my release, that I will faithfully keep all the conditions specified on this sheet and all other conditions and instructions given to me by the Board of Parole or any of its representatives.

1. I will proceed directly to the place to which I have been released (spending funds only for necessities), and within twenty-four hours, I will make my arrival report to

2. I will not leave the State of New York, or any other State to which I may be released or transferred, or any area as defined by the Parole Officer in writing, without the written or documented permission of my Parole Officer.

3. (a) I will fully comply with the instructions of my Parole Officer. (b) I will make office and/or written reports as I am directed. (c) I will reply promptly to any communication from a Member of the Board of Parole, a Parole Officer, or other authorized representative of the Board of Parole. (d) I am aware that making false reports may be considered a violation of the condition of my release.

4. (a) I will permit my Parole Officer to visit me at my residence or place of employment. (b) I will discuss with my Parole Officer any proposed changes in my residence, and I will not change my residence without prior approval of my Parole Officer. (c) I understand that I am legally in the custody of the Board of Parole and that my person, residence, or any property under my control may be searched by my Parole Officer or by any other representative of the Board of Parole at its direction. (d) If so directed, I will observe a curfew.

5. I will avoid the excessive use of alcoholic beverages. If so directed by the Parole Board or my Parole Officer, I will abstain completely from the use of alcoholic beverages.

6. (a) I will make every effort to secure and maintain gainful employment. (b) If, for any reason, I lose my employment, I will report this to my Parole Officer immediately and I will cooperate fully in finding new employment. (c) I will not voluntarily quit my employment without prior approval of my Parole Officer.

7. (a) I will lead a law-abiding life and conduct myself as a good citizen. (b) I will not be in the company of or fraternize with any person having a criminal record, if there are unavoidable circumstances (such as work, school, family or group therapy and the like), I will discuss these with my Parole Officer and seek his written permission. (c) I will support my dependents, if any, and assume toward them my legal and moral obligations. (d) I promise my behavior will not be a menace to the safety or well-being of myself, other individuals, or to society. (e) I will advise my Parole Officer at any time that I am questioned or arrested by members of any law enforcement agency.

8. I will consult with my Parole Officer before applying for a license to marry.

9. I will not carry from the Facility from which I am released, or cause to be delivered or sent to any Correctional Facility, any written or verbal message or any object or property of any kind without proper permission.

10. (a) Upon my release, I will advise my Parole Officer as to the status of any driver's license I possess. (b) I will seek and obtain permission of my Parole Officer before applying for or renewing a driver's license. (c) I will request and obtain permission of my Parole Officer before owning or purchasing any motor vehicle.

11. I will not own, possess, or purchase firearms or weapons of any kind.

12. I will not use, possess, or purchase any illegal drugs or use or possess those that have been unlawfully obtained.

13. Should the occasion arise, I will waive extradition and will not resist being returned by the Board of Parole to the State of New York.

14. Special Conditions:

I hereby certify that I have read and that I understand the foregoing conditions of parole and that I have received a copy of this Certificate of Release.

Signed this day of

19

Witness:

Address:

1 A P P E A R A N C E S :

3

2 LEGAL ACTION CENTER OF THE CITY OF NEW YORK
3 Attorneys for Petitioner
4 271 Madison Avenue
 New York, New York 10016
5 BY: MARK C. MORRIL, ESQ.

6 LOUIS J. LEFKOWITZ, ESQ.
7 Attorney General of the State of New York
8 Attorney for Respondents
9 Two World Trade Center
10 New York, New York 10048
11 BY: GERALD J. RYAN, ESQ. of Counsel

12 * * *

13 MR. MORRIL: For the record, this
14 is a deposition in the case of Carmona
15 against Ward, a habeas corpus pro-
16 ceeding now pending in the United
17 States District Court for the Southern
18 District of New York, number 75CIV
19 6219.

20 E D W A R D E L W I N, having first been duly
21 sworn before a Notary Public of the State of
22 New York, was examined and testified as follows:

23 EXAMINATION BY

24 MR. MORRIL: -

25 Q What is your name?

 A Edward Elwin.

1

2

Q What is your address?

3

A 17 Leslie Court, Loudonville, New York.

4

5

Q Mr. Elwin, what is your present position?

6

7

8

A I am the Deputy Commissioner of the Department of Correctional Services for Parole and Community Services.

9

10

11

Q How long have you been in that position?

A I have been in that position since July of 1975.

12

13

Q Can you describe your other experience with the Department?

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A I joined the Division of Parole which was at that point in the executive department in 1954. I worked as a parole officer from 1954 to 1959. From 1959 I went to the then Kings County Court as a probation officer and worked in various capacities in the probation department until I reached the position of a Deputy Chief Probation Officer in Kings County. That was in 1972 that I left probation and joined the Department of Correctional Services as a deputy Commissioner for Parole Services. Then, I served in that capacity from 1972 until 1975.

Q Would you describe your educational

1
2 background please?

3 A I have a Bachelor out of Brooklyn College. I
4 have a Masters in Social Psychology at the New York
5 University. My Masters in Correctional Administration
6 out of New York University.

7 Q Are you teaching courses in Parole now?

8 A Not at the present time, I have in the past.

9 Q You have in the past?

10 A Yes.

11 Q What were the courses that you taught?

12 A I taught Social Work in probation in the
13 Parole centers. I taught administration in parole
14 and probation centers.

15 Q Would you describe your duties and
16 responsibilities as a Deputy Commissioner of Correctional
17 Services for Parole?

18 A I am in charge of all field services in the
19 Division of Parole. I am in charge of institutional
20 parole services and in charge of the work release
21 services.

22 Q Whom do you report to in that division?

23 A I report to the Commissioner of the Department
24 of Correctional Services and have a liason relationship
25 with the Board of Parole.

1
2 Q Are you then the highest official in
3 New York State directly concerned with the noninstitutional
4 aspects of parole on a full time basis?

5 A Correct.

6 Q Mr. Elwin, are you familiar with the
7 provision of the 1973 New York drug law which requires
8 that all persons convicted a Felony drug offense be
9 sentenced to lifetime parole without the possibility
10 of discharge if he is ever released from prison?

11 A Yes.

12 Q Mr. Elwin, are all persons in New York
13 State who are on parole assigned to a parole officer?

14 A That is correct.

15 Q That is true no matter how long they
16 have been on parole?

17 A That is correct.

18 Q Are there certain reporting requirements
19 for persons who are on parole?

20 A Yes, when a person is initially placed on
21 parole, they are initially placed on intensive
22 supervision for a period that averages out to about
23 six months. At the end of that period, they may have
24 reduced the reporting to inactive supervision and
25 they can be placed on a reduced schedule.

1

2 Q How frequently is a person required to
3 contact his or her parole officer under those various
4 supervision categories?

5 A Initially under the intensive supervision, a
6 person reports a minimum of either weekly or bi-weekly.
7 On active supervision, they would report monthly or
8 bi-monthly. On reduced supervision, they may report
9 four times a year.

10 Q Mr. Elwin, is there any provision
11 administratively in the department for reporting to
12 parole officers less frequently than quarterly?

13 A No, there is none.

14 Q That is no matter how long a person has
15 been on parole?

16 A That is correct.

17 Q Mr. Elwin, you testified you were with
18 the department in 1954 and subsequently.

19 Now, at that time, was it true that the
20 department had some people who were on supervision
21 for long periods of time?

22 A At that time, that was true.

23 Q If you know, were people who were on
24 parole for a long period of time in that era allowed
25 to drift away and lose contact with their parole officer?

1
2 A If the person lost contact with his parole
3 officer, that in and of itself was the grounds for
4 violating the parole. They were to report to the
5 parole officer. Leaving his approved residence,
6 leaving his job is what we call absconding and at
7 that point, a warrant for his apprehension will be
8 secured.

9 Q To your knowledge, were there any such
10 violations in that era?

11 A Yes, there were people who did drift away and
12 on a few cases, there are warrants'outstanding for
13 those people right up to the present.

14 Q Mr. Elwin, as a matter of policy while
15 you have been running the department, are persons
16 who were legally under the custody of the department
17 for Parole Supervision allowed to drift away from the
18 parole officer and lose contact?

19 A No, we still follow the same rules. Failure
20 to report, leaving the residence, would result in a
21 warrant for their apprehension.

22 Q That is true no matter how long a person
23 is on parole?

24 A That is correct.

25 Q Mr. Elwin, you described the reduced

1
2 reporting schedule which I believe was quarterly.

3 Are there circumstances under the reduced
4 reporting schedule under which the schedule would be
5 changed and a person would once again be required to
6 report more frequently?

7 A Yes, if there are violations of the technical
8 rules. If there is reason to believe that a person
9 is in need of supervision in the opinion of his
10 supervising parole officer as well as the senior of
11 that person. That person can be brought back to
12 intensive supervision category.

13 Q Can you describe, elaborate a little bit
14 on the type of circumstances that might lead to
15 reinstituting stricter supervision?

16 A If you have a person who was an addict or
17 an alcoholic and you have reason to believe that they
18 may have indulged in the use of drugs or gotten
19 involved in excessive drinking, if a person has an
20 inordinant amount of family difficulties, we will
21 probably consider at least for a short time period more
22 intensive supervision. Even if a person simply was
23 out of employment and it was felt that there is a need
24 to observe him more closely or to offer him aid in
25 securing employment. Then, we would see that person

more often.

Q So that in family stress, even if it is not the fault of the parolee, but you felt there was a stressful circumstance in which the parolee might benefit or need supervision?

A That is correct.

Q Just to emphasize that, that includes not only criminal conduct?

A That is correct.

Q Mr. Elwin, are all parolees in New York State required to sign a form parole contract upon release from prison?

A That is a requirement.

MR. MORRIL: Mark this as Exhibit one for this deposition.

(Whereupon, said document was marked as Petitioner's Exhibit one for identification by the reporter, as of this date.)

Q Mr. Elwin, I am showing you Petitioner's Exhibit one to this deposition and I ask you if that is the parole contract that is presently in use?

A Yes, this is the form that is currently used.

Q Mr. Elwin, assuming that a parolee reaches

1
2 the status of reporting to his or her officer infre-
3 quently or quarterly as you said, which is the least
4 frequent that he or she can report, will the parolee
5 still be required to adhere to all the provisions
6 of that contract?

7 A Yes.

8 Q Could he or she have his parole revoked
9 for violation of this contract?

10 A Violations of any of the rules must be reported,
11 evaluated and the parole may be revoked.

12 Q Then, violations of any rule would in your
13 opinion be brought to the attention of the supervising
14 parole officer?

15 A That is right.

16 Q And parole revocation would be considered
17 and it might result in ---

18 A If the immediate supervisor saw a violation of
19 the rules as being sufficient, a violation of parole
20 would be initiated. If they think the breaking of
21 the rules is not sufficient for a violation, a memorandum
22 would be submitted to the board of parole. The Board
23 would have the option in the latter case of ordering
24 revocation, if the violation in their opinion was serious
25 enough, so that any rule violation would be brought

to the attention of the administration.

Q So that no rule or violation would be ignored?

A No.

MR. RYAN: I object to the form of that question.

Q Would you describe the role of the individual parole officer in the decision to institute revocation procedures?

MR. RYAN: Let me object to this and to the last question and to this present question as not being relevant to the petitioner's case that is before the District Court. Apparently up to this point, she hasn't been violated, so I object to that question.

Q You can answer that.

A If the officer had information believing that a parole violation has taken place, he will discuss it with his immediate supervisor, the senior parole officer. If there is an agreement that this is sufficient for a violation to be prepared, a warrant is secured for the parolee's detention. Once taken into

STATE OF NEW YORK)
 : SS.:
COUNTY OF NEW YORK)

VALERIE PIRONE , being duly sworn, depose and
says that she is employed in the office of the Attorney
General of the State of New York, attorney for
herein. On the 27th day of October , 1977 , she served
the annexed upon the following named person :

LEGAL ACTION CENTER of the
CITY OF NEW YORK, INC.

By: Elizabeth B. DuBois

Risa G. Dickstein

Mark C. Morril

271 Madison Avenue

New York, New York 10016

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Jennings

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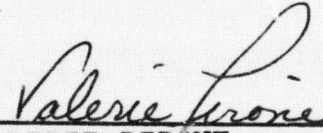
New York, NY 10011

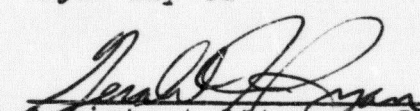
Atty. for Petitioners

Fowler

Attorneys in the within entitled proceeding by depositing
a true and correct copy thereof, properly enclosed in a post-
paid wrapper, in a post-office box regularly maintained by the
Government of the United States at Two World Trade Center,
New York, New York 10047, directed to said Attorneys at the
addresses within the State designated by them for that
purpose.

Sworn to before me this
29th day of October , 1977


VALERIE PIRONE


Assistant Attorney General
of the State of New York

c.

1
er